

Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules

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The traditional nuclear family—where mom is married to dad and they are raising their biological kids—is no longer the norm in America. Nowadays, only one-fifth of America’s households consist of a currently married husband and wife raising children.¹ Only 51% of all adults were married in 2011, the lowest figure in recorded American history and a striking contrast to the 72% who were married fifty years ago.² Almost one third of the households with children are headed by single persons or unmarried couples.³ Over half a million American households are headed by married or unmarried same-sex couples, with nearly a quarter of those raising children.⁴ There is now a pluralist array of families in the United States. A century ago, “family” was culturally confined to persons related by marriage and blood; today, family is defined by relations of affinity, love, and commitment.⁵ Large majorities of Americans believe that “family” includes married couples raising children, single parents

1. *Selected Social Characteristics in the United States: 2010 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU: AM. FACT FINDER, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_DP02&prodType=table [hereinafter *2010 ACS*] (last visited Apr. 13, 2012); see also Press Release, U.S. Census Bureau, U.S. Census Bureau Reports Men and Women Wait Longer To Marry (Nov. 10, 2010), available at http://www.census.gov/newsroom/releases/archives/families_households/cb10-174.html.

2. See D’VERA COHN ET AL., PEW RESEARCH CTR., BARELY HALF OF U.S. ADULTS ARE MARRIED—A RECORD LOW 1 (2011), available at <http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf>. The percentage of adults who are married has likely dipped below fifty percent since the Pew Report. See Cheryl Wetzstein, *U.S. Marriage Rate Continues Decline; Men Tie Knot Later*, WASH. TIMES (Feb. 15, 2012), <http://www.washingtontimes.com/news/2012/feb/5/us-marriage-rate-continues-decline-men-tie-knot-la/?page=all>.

3. To extrapolate this data from several categories in the ACS tables, see *2010 ACS*, *supra* note 1.

4. According to the Williams Institute, the 2010 Census revealed 646,464 same-sex couples in the United States, with 111,033 raising children. GARY J. GATES & ABIGAIL M. COOKE, WILLIAMS INST., UNITED STATES CENSUS SNAPSHOT: 2010, at 1, 3 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>. For an early report of this trend, see KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991).

5. For some useful surveys making this point, see generally JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* (2000), and J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J.L. & PUB. POL’Y 521 (2011).

raising children, lesbian and gay couples raising children, and married couples who are not raising children.⁶

In the last century, American family law has accommodated this social pluralism through a regulatory pluralism that has been accomplished by a variety of liberalizations of traditional family law. Legal scholars such as Margaret Brinig, Naomi Cahn, June Carbone, Herbie DiFonzo, and Jana Singer have documented the *contraction* of family law to allow couples more opportunities to form choice-based relationships that depart from traditional legal baselines such as marriage-for-life.⁷ Other legal scholars, such as Randall Kennedy, Nan Hunter, and I, have documented the *expansion* of family law to include different-race couples and, more recently, same-sex couples in state regulatory regimes.⁸ The expansion of family law has also entailed the creation of new institutions, such as civil unions and reciprocal beneficiaries, to meet the needs of unmarried lesbian, gay, and straight couples.⁹ Jill Hasday has shown how family law has increasingly been made or influenced at the federal level.¹⁰

The simultaneous contraction *and* expansion of family law have usually not been treated in public discourse as related phenomena—until the great debates over marriage equality for lesbian, gay, bisexual, and transgender (LGBT) persons. Traditionalist critics of marriage equality for these minorities, including prominent conservatives such as former Senator Rick Santorum and former Judge Robert Bork, maintain that traditional marriage has already been so weakened by cohabitation trends and no-fault divorce (the contraction of family law) that marriage for lesbian and gay couples (an expansion of family law) would lead to the end of marriage.¹¹ For these critics, family law properly

6. See PEW RESEARCH CTR., *THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES* 40 (2010), available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>. Cohabiting couples without children were considered families by only a minority of those responding to the survey. *Id.*

7. See MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* (2000); NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010); J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* (1997); Margaret F. Brinig & Steven L. Nock, *The One-Size-Fits-All Family*, 49 SANTA CLARA L. REV. 137 (2009); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1446–56; see also MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 35–42 (1993) (documenting contraction of family law).

8. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* ch. 6 (3d ed. 2011); RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 244–80 (2003).

9. ESKRIDGE & HUNTER, *supra* note 8, at ch. 3 § 2, ch. 8.

10. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 871–87, 893–97 (2004) [hereinafter Hasday, *Canon*] (categorizing social security and federal welfare as family law regulation); see also Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1370–86 (1998) (noting examples of modern federal provisions that can be classified as family law).

11. RICK SANTORUM, *IT TAKES A FAMILY: CONSERVATISM AND THE COMMON GOOD* 28–39 (2005); *Uncommon Knowledge with Peter Robinson: Robert's Rules of Order: A Conversation with Robert Bork*, HOOVER INST. (July 16, 2003), <http://www.hoover.org/multimedia/uncommon-knowledge/27065#nogo> [hereinafter *Uncommon Knowledge*]; Lynn D. Wardle, *The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage*, 25 BYU J. PUB. L. 287 (2011). A quasi-empirical

focuses on ties of marriage, procreation, and blood; the “liberalization” of family law has undermined marriage and loosened the biological connection among marriage, procreation, and parenting; and further liberalization would be fatal to the cherished institution of marriage and would destroy the proper normative mission of family law.¹²

Such end-of-marriage arguments have not been supported by the experience of jurisdictions recognizing lesbian and gay unions and marriages.¹³ This is not surprising, as the Bork–Santorum way of thinking reveals a fundamental confusion: their association of liberalizations that are deregulatory in their thrust, like legalized cohabitation and no-fault divorce, and liberalizations that are on-the-whole regulatory, like extending the civil-marriage regime to lesbian and gay couples. Progressive critics of same-sex marriage, such as Nancy Polikoff, astutely recognize this contrast and provide a more useful analysis for that reason.¹⁴ But there is a deeper point underlying the Bork–Santorum critique of marriage equality: traditionalist critics believe that the optimal goal of family law is to encourage everyone to get married and to raise her or his biological children. This implicit commitment to marital and blood ties once dominated American thinking about families but no longer holds such a predominant position in this country.

The opposite mistake is made by supporters of marriage equality who argue that the government should get out of the marriage business altogether and should leave romantic relationships entirely to private contracting.¹⁵ To be sure, the proposal of the Cato Institute’s David Boaz and others to privatize marriage is making a deep and interesting point about the relationship of law to family. Libertarian critics believe that the optimal goal of family law is to enforce the

version of this argument can be found in Stanley Kurtz, *The End of Marriage in Scandinavia*, WKLY. STANDARD, Feb. 2, 2004, at 26, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zywpwj.asp>.

12. See SANTORUM, *supra* note 11; *Uncommon Knowledge*, *supra* note 11.

13. See, e.g., WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE* ch. 5 (2006) (demonstrating that marriage in “liberal” Scandinavia actually revived a bit after lesbian and gay partnerships were recognized under the law); Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 Soc. SCI. Q. 292, 305–06 (2009) (demonstrating through sophisticated empirical analysis that no causal relationship exists between gay-marriage recognition and adverse marriage or divorce rates).

14. See, e.g., NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 83–88 (2008) (contrasting the prochoice regimes for family law that progressives should be supporting with the marriage-equality movement, which would undermine effective choice for many nontraditional couples). See also Wardle, *supra* note 11, which I think also avoids the confusion introduced by Judge Bork and Senator Santorum.

15. See, e.g., David Boaz, *Privatize Marriage: A Simple Solution to the Gay-Marriage Debate*, SLATE (Apr. 25, 1997, 3:30 AM), <http://www.slate.com/id/2440/>. For a more moderate take on the same idea, see Cass R. Sunstein & Richard H. Thaler, *Privatizing Marriage*, 91 MONIST 377, 379, 386 (2008) (arguing for either abolishing civil marriage or giving all couples a choice between marriage and civil unions).

relationship preferences of mature adults, without governmental meddling. Their implicit commitment to a prochoice approach has gained traction in the last generation but, like the traditionalist commitment, does not reflect the aspirations of American thinking about family law. Most romantic couples do not reach agreement on a host of matters important to their lives, and when they do reach agreement, it is often tainted by unfair treatment of one of the partners or of children.¹⁶ The Cato Institute's proposal also rests upon confusion about American contract law, which has never rested upon the premise that the law does nothing but enforce contractual agreements. Indeed, contract law is often highly regulatory, though its mode of regulation is distinctive in the way it balances the autonomy and market values of prochoice deregulation with the governmental interests in protecting against choices that are not entirely voluntary or that affect third parties (such as children).¹⁷

Mindful of the traditionalist notion that government has a normative role to play in guiding and sometimes correcting today's plurality of family forms, this Article borrows ideas and terminology from contract law to explore and, ultimately, evaluate the history of American family law's accommodation of our increasing pluralism of families. My primary thesis is that the normative foundation of family law has changed in this period—away from natural law norms and toward utilitarian ones—and that the new normative foundation supports regulation through guided choice rather than the mandatory rules that dominated the prior regime. Under utilitarian criteria, the most controversial liberalization, namely, same-sex marriage, is an easy call, while the most popular liberalization of the last century, namely, no-fault divorce, is not.

Part I is a sociology of American family law in the last one-hundred years. This sociology traces the interconnected pluralism of American families and our increasingly pluralist family law. Consistent with the libertarian account, family law in the last century has abandoned many of its longstanding rules prohibiting specified conduct and refusing to recognize many relationships. The dramatic decline of these kinds of rules has opened up new legal choices for romantic couples. Consistent with the traditionalist account, however, the state continues to regulate those choices—but more gently, through off-the-rack baselines that couples may modify according to rules that inform, guide, and sometimes inhibit their decision making. To use Dan Kahan's felicitous terminology, the

16. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 226–36 (1995) (arguing for the privatization of romantic relationships and the abolition of civil marriage—yet also for more governmental support for and regulation of caregiving relationships).

17. See, e.g., Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992) (modern family law recognizes private choices but also channels them into socially productive directions); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1247 (1998) (arguing that contract law is often highly regulatory and is an appropriate model for analyzing a regulatory family law).

state has moved away from “hard shoves” in family law, toward a “gentle nudges” approach to regulation.¹⁸

This gentle nudges approach to family law reflects a larger normative shift in this country—away from the natural law norm of procreative marriage and strongly toward the utilitarian norm that emphasizes individual flourishing and the value of family for both partners as well as children they are rearing.¹⁹ The natural law approach to families emphasizes the virtues of a single institution—procreative marriage—and encourages or pressures everyone to join this institution. The country long ago moved beyond this approach and has steadily moved toward a utilitarian approach that seeks to maximize overall happiness of all the participants. The utilitarian approach accommodates our social pluralism in family formation, such that the state recognizes a variety of family institutions, each tailored to different circumstances and preferences. As the marriage-equality debate reveals, the natural law understanding has not disappeared—but the triumph of the more modern perspective is revealed when natural law enthusiasts such as Rick Santorum make their public appeals in largely utilitarian terms.²⁰

18. See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 608 (2000) (introducing the “gentle nudges/hard shoves” approach and applying it in other real-world contexts); Schneider, *supra* note 17, at 513 (family law operates through incentives and nudges more than coercive rules); cf. June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859 (2011) (questioning whether the channeling function is possible in an era that lacks shared meanings).

19. See, e.g., ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 29–32 (2009) (discussing how the high value Americans place on “expressive individualism” reveals itself in a prochoice philosophy for family relations and has inspired a regulatory movement away from insistence on traditional marriage toward recognition of companionate marriage focused on the happiness of both partners); JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 84–88, 96 (2002) (arguing that Enlightenment-based individual-flourishing culture has displaced traditional valorization of marriage as an institution and lamenting this development); Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988) (linking changes in marriage and divorce to economic and social changes, with a correspondingly greater emphasis on mutual affection and individual choice in American family law); Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347 (2008) (similar); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1847 (1985) (describing the transformation of family law in terms of abandonment of morals-based reasoning and adoption of psychology-based reasoning); see CAHN & CARBONE, *supra* note 7, at 1–15 (tracing a related development—the rise of “blue [state] families,” focused on the happiness of all members of the family and allowing more choices than permitted for “red [state] families”); see generally ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1st California paperback ed. 1996) (tracing the decline of a communitarian spirit in the United States, replaced by individual flourishing as the goal).

20. See SANTORUM, *supra* note 11, at 21 (“It is an open and shut case: the best place for kids to grow up is with a happily married mom and dad, and the more of these families there are in the community, the better it is for everyone.”). Indeed, this is a general phenomenon: the staunchest defenders of “traditional” marriage have overwhelmingly couched their public arguments in the language of individual flourishing and social utility rather than in the now-outdated argot of sectarian natural law motifs. See, e.g., W. BRADFORD WILCOX, *WHY MARRIAGE MATTERS*, THIRD EDITION: THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES (3d ed. 2011) (defense of traditional marriage based upon social science arguments that marriage is better for people’s well-being, good health, and economic success, as well as

An important idea that has driven the transformation of family law toward expanded choices for adult relationships has been an increasing social, political, and constitutional recognition of sexual satisfaction as a human good and, for most people, a necessary component of a flourishing life. As traditional taboos against interracial and homosexual activities have eased, so has the notion that everyone must get married in lifetime commitments. Law's response to this phenomenon has been to abandon its exclusive focus on marriage and to reconsider the legal parameters of that institution. Changes in the law have been both deregulatory and regulatory. Legal reforms to marriage law have permitted more choices by sexually active Americans, while at the same time creating new nonmarital regulatory regimes for these Americans.

Recall the clash between the traditionalist and libertarian approaches to the marriage-equality debate: the former insists on state-enforced norms to influence family choices, while the other emphasizes a prochoice contract law approach. Part II of this Article shows how these different perspectives are not entirely at odds. Specifically, I shall analyze family law's expanded-choice revolution through the analytical prism of contract theory developed by Ian Ayres and others.²¹ The regulatory punch line is that American law has moved toward a *guided-choice* approach to family formation: the state imposes few rules absolutely barring a person from becoming involved in a romantic (that is, sexual) relationship with the person of her choice, but the state does guide the romantic decision makers. Guidance is provided by (1) background rules that must be consciously overridden by the couple's affirmative choice, (2) rules and procedures that require deliberation before the couple make particular choices, and (3) state-provided incentives—as well as by rules that protect the interests of vulnerable persons, especially children.

In the argot of contract theory, family law has always been a mixture of *mandatory rules* and *default rules*. Mandatory rules are those that cannot be contracted around by private persons and corporations. In 1911, for example, states' mandatory rules criminalizing sexual activities outside of marriage (fornication and sexual cohabitation) created a marriage monopoly for procreative sexual activities. Default rules are those that romantic couples can contract

for society as a whole); Wardle, *supra* note 11, at 299–301 (leading his traditionalist defense of marriage exclusions with utilitarian arguments and then mentioning natural law arguments in support of the exclusion); Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365 (2007) (emphasizing a much more elaborate litany of utilitarian ills that would accompany marriage equality, including the encouragement of AIDS and disastrous consequences for children); Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279 (2005) (arguing that traditional marriage is necessary for the utilitarian welfare of children and assembling sources to that effect). For other traditional-family-values supporters emphasizing the same utilitarian arguments, see also sources in *infra* notes 273–74.

21. See Ian Ayres, *Regulating Opt Out: An Economic Theory of Altering Rules*, 121 YALE L.J. (forthcoming 2012) [hereinafter Ayres, *Altering Rules*]; Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 7–11 (2006) [hereinafter Ayres, *Menus Matter*]; Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87, 127 (1989).

around; starting in the mid-twentieth century, for example, some states decriminalized fornication and, to a lesser extent, adultery. The default in those states was still no sexual activities, but that default was easily overridden if both participants consented. Today, almost all states have repealed their laws criminalizing fornication and nonmarital sexual cohabitation. In effect, a mandatory rule has been replaced by a default rule. In contrast, there are still mandatory rules barring public sexual activities or sex with minors; consent of both persons who engaged in sex does not override these mandatory rules.

Family law's default rules have been accompanied by what I call *override rules*. Override rules, which are the same as what Professor Ayres calls "altering rules,"²² are the legal steps or requirements that the parties must follow or meet to override a legal default. After the state decriminalization of fornication and sexual cohabitation, the override rule allowing sexual activities was very lenient. Unless one of the participants was a minor or mentally disabled, the formal override rule was consent by both participants. In the last generation, the override rule has become more stringent because of feminist complaints that the traditional rule frequently allowed intercourse that a woman did not meaningfully agree to. So today, the default is often not overridden if one participant is in a position of authority over the other, even though the other participant formally agrees to sexual activities. This illustrates how override rules are often the primary mode of regulation in the modern regulatory state.

Contract law offers another regulatory concept that helps us understand the guided-choice approach and the evolution of family law in the last century: *menus*.²³ Just as the state offers contracting parties different menus of off-the-rack rules that they can easily opt into, so the state might offer romantic couples varying menus, each consisting of different mandatory, default, and override rules. The concept of a menu is, in fact, the most powerful regulatory concept for understanding the guided-choice approach and for seeing how it is both strongly prochoice yet at the same time may be strongly regulatory.

To be specific, American family law in the last century has moved *away from* a monopolistic regime where marriage—with its hundreds of legal entitlements, requirements, and defaults—was the only item on the menu, and it has moved *toward* a pluralist regime where each state offers a larger menu of options for romantic couples, including those with children. Among the regimes offered by the expanding menu, American family law in the last century has moved *away from* regimes dominated by mandatory rules, such as rules against sex outside

22. Ayres, *Altering Rules*, *supra* note 21; Ayres, *Menus Matter*, *supra* note 21, at 6.

23. See WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS ch. 6 (2002) (introducing the concept of a "menu" of regulatory options into American family law discourse); Ayres, *Menus Matter*, *supra* note 21, at 3; Yair Listokin, *What Do Corporate Default Rules and Menus Do? An Empirical Examination* 36–38, (John M. Olin Ctr. for Studies in Law, Econ., and Pub. Policy, Research Paper No. 335, 2006), available at <http://ssrn.com/abstract=924578> (empirically demonstrating that such a menu approach to corporate law has regulatory effects on corporate decision making).

of marriage, and it has moved *toward* regimes dominated by default rules with override requirements, some of which are quite stringent.

The menu–default–override analysis of family law has the great virtue of making sense of the legal revolution in the last generation and tying together in a useful way the deregulatory and new regulatory features of family law. It also provides a framework for the normative questions that will be important for the future of family law: What relationships ought to be included in the topic of “family law”? What regulatory menus should be offered to relationship partners? In each menu, what ought to be the default rules and what ought to be the override rules available to partners opting into those menus? Should there be mandatory rules as well?

Although this analysis does not tell us exactly what the rules of family law will be or ought to be, it provides a better way of accommodating the important goals of family law: encouragement of committed relationships, lowering transaction costs for couples to achieve their own goals, and protecting vulnerable persons.²⁴ Specifically, Part III will explore the ways in which the menu–default–override framework is a better regime for handling this complicated array of public purposes and for advancing the ball in the acrimonious debate over marriage equality for gay and lesbian couples. Indeed, Part III argues that both traditional-family-values advocates, who tend to oppose *gay* marriage, and progressives, who often oppose *gay marriage*, can learn a lot from this framework, which suggests experiments that each ought to be propounding, rather than simply opposing marriage equality.

The Article concludes with some overall thoughts on how the menu of relationship regimes ought to be formalized in the next generation. To begin with, the utilitarian perspective supports a baseline of nondiscrimination and therefore tolerance of family pluralism: most human beings potentially flourish in relationships, and American family law ought, presumptively, to provide a supportive context for such relationships and for the rearing of children. This baseline not only supports marriage equality for LGBT persons and their partners but also for many partners already related to one another and, possibly, for persons in polyamorous relationships. Additionally, the utilitarian perspective supports rules that open up choices for American adults, not only as to whom they want to partner with but also as to the rules of their partnership. The

24. Compare the articulation of the “functions of family law” in CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES* 211–21, 1386–96 (3d ed. 2006), namely, (1) the channeling and expressive function of family law to encourage and approve committed relationships, *id.* at 215–21, 1389–96; (2) the “facilitative” function of family law, *id.* at 213–14, 1387–88; and (3) the “protective” and “arbitral” functions of family law to protect vulnerable persons and provide them and other family members a neutral forum for grievances, *id.* at 212–15, 1386–89. See also David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996) (providing a similar analysis of the variety of purposes served by family law). For an excellent and detailed treatment of the interplay among the commitment-encouraging, facilitative, and protective features of family law, and how they have been sacrificed by the expansion of partner choices, see BRINIG, *supra* note 7.

utilitarian perspective does not necessarily favor unlimited choice; this perspective can support mandatory rules in many instances and guided-choice rules and menus in most other cases. A critical role is played by override rules, which are procedural mechanisms that facilitate or guide choice, but also may mediate the stark substantive value clashes that are common in family law.

Modern family law's new centerpiece may be its evolving menu of relationship regimes. For most states, the menu of relationship regimes has developed haphazardly and without a systematic public debate about the effects of the menu—and the various regimes of default and override rules—on society, civil marriage, and children. Legislative study commissions should examine the state hodgepodge of relationship regimes that have sprung up in response to cohabitation patterns and the gay-marriage movement and figure out what mix of institutions best meets the balanced needs of society and its citizens and what mandatory, default, and override rules would work best for each regime. In making that determination, the central regulatory questions are whether the state should create a new civil institution to replace marriage, how much the state wants to nudge its citizens toward marriage or these new civil unions, and what mix of incentives, default-with-override rules, and mandatory rules the state ought to impose on the different regimes in its emerging family law menu.²⁵

The main prescriptions are as follows. The utilitarian framework demands a pluralistic family law that accommodates the needs of a variety of “families,” not just traditional (dad-mom-kids) families. The nondiscrimination baseline will require ongoing expansion of family law's reach, not just to lesbian and gay unions and (soon) marriages, but also to related persons, persons connected by their relation to children, and even friends. Even more important for the lives of partners and their families will be state decisions about what relationship regimes will be included in the expanding menu of options and precisely what default-with-override rules will be connected to each regime. The utilitarian framework suggests that policy decisions along these lines ought to be made through the legislative-administrative processes, for they can consider trade-offs and compromises that might best advance the complicated hedonic goals of family law. For example, as a way to accommodate both traditionalist procommitment policies and pluralistic policies, legislatures ought to consider a *grand compromise*, whereby the state would recognize marriage equality for LGBT citizens while at the same time regularizing the jurisdiction's ad hoc cohabitation rules and creating a new regime of covenant marriage, with generous state incentives for couples with children.

25. Cf. LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001) (presenting an evidence-based description of the sociology of the family in Canada and proposing a new regime for registration of partners that would better meet the needs of these citizens and their families).

I. A SOCIOLOGY OF THE GUIDED-CHOICE REGIME OF
FAMILY LAW PLURALISM, 1911–2011

American families and family law changed dramatically in the first century of *The Georgetown Law Journal*, namely, the years between 1911 and 2011.²⁶ In 1911, almost all American families followed the traditional model of a man married for life to a woman, rearing their biological children. The husband–wife couple was almost always of the same race and usually of the same religion and ethnicity. The husband controlled the family resources and participated in the public spheres of economy and politics; the wife governed the domestic sphere of the household and usually did not work outside the home.²⁷

The family in 2011 looks a lot different than it did in 1911. Many Americans have opted out of the “household family,” as they live alone.²⁸ Adults living together in the same household are usually married, but at much lower levels, and they include same-sex as well as different-race married or cohabiting couples.²⁹ Whether married or cohabiting, women have more control over family resources and participate in the public sphere more than ever before in American history. Fewer households are rearing children, and many of those children are not the biological progeny of both parents. Specifically, one-sixth of America’s children are being raised in blended households (where one or both parents are not biologically related to the child) and another quarter in households headed by just one parent.³⁰

During the same period in which the American family has changed dramatically, American family law has changed as well. The overall transformation can be described as creating a more *pluralistic* legal regime, which regulates

26. See, e.g., NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000).

27. In the early twentieth century, married women rarely worked outside the home, and when they did, they rarely earned a living wage. See, e.g., CHRISTINE E. BOSE, *WOMEN IN 1900: GATEWAY TO THE POLITICAL ECONOMY OF THE 20TH CENTURY* 60 tbl.6 (2001) (showing that in 1900, just four percent of wives were gainfully employed); LESLIE WOODCOCK TENTLER, *WAGE-EARNING WOMEN: INDUSTRIAL WORK AND FAMILY LIFE IN THE UNITED STATES, 1900–1930*, at 9–10 (1982) (documenting women’s low wages). The domestic sphere of the household was considered the wife’s sphere. TERESA AMOTT & JULIE MATTHAEI, *RACE, GENDER, AND WORK: A MULTI-CULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES* 302 (1991); TENTLER, *supra*, at 8–10.

28. See COHN ET AL., *supra* note 2.

29. See *id.*; PEW RESEARCH CTR., *supra* note 6, at 66–67; WENDY WANG, PEW RESEARCH CTR., *THE RISE OF INTERMARRIAGE: RATES, CHARACTERISTICS VARY BY RACE AND GENDER* 5 (2012), available at <http://www.pewsocialtrends.org/files/2012/02/SDT-Intermarriage-II.pdf>. See generally Christopher Carpenter & Gary J. Gates, *Gay and Lesbian Partnership: Evidence from California*, 45 *DEMOGRAPHY* 573 (2008) (analyzing data on the cohabitation rates of self-identified gay and lesbian individuals).

30. See PEW RESEARCH CTR., *supra* note 6, at 17 (citing data from the U.S. Census showing that in the United States in 2008, twenty-five percent of children under age fourteen were living in single-parent households); OFFICE JUV. JUST. & DELINQ. PREVENTION, *Statistical Briefing Book* (Apr. 22, 2011), <http://www.ojjdp.gov/ojstatbb/population/qa01201.asp?qaDate=2010> (citing U.S. CENSUS BUREAU, *Living Arrangements of Children Under 18 Years Old: 1960 to Present* (Nov. 2010), <http://www.census.gov/population/socdemo/hh-fam/ch1.xls>) (showing that twenty-seven percent of children live in single-parent homes); ROSE M. KREIDER, *LIVING ARRANGEMENTS OF CHILDREN: 2004*, at 10 tbl.6 (2008), available at <http://www.census.gov/prod/2008pubs/p70-114.pdf>.

through the mechanism of *guided choice* for sexual couples in the United States. Overall, American family law today is much more prochoice than it was in 1911: more Americans have the choice to marry the person they love; within marriage, the spouses have more choices; and romantic couples have legal options for a life together outside of marriage.

This Part starts with a brief overview of the family-law developments in the last century, emphasizing both contractions of state regulation and the creation of new modes and rules of state regulation (section A). I then explore the social bases for these legal developments (section B) and the larger normative revolution that undergirds our modern family law's pluralist regime of guided choice (section C). The next Part will offer a more detailed examination of these developments, but using the contract-based terminology noted above.

A. THE EMERGENCE OF A GUIDED-CHOICE REGIME, 1911–2011

The legal regime of American family law in 1911 was highly regulatory, forbidding and even criminalizing relationship choices that flourish today. Although marriage was highly regulatory, it was much more restricted as well. Family law in 2011 is a regime that is more pluralistic and inclusive than family law a century earlier. It is also a regime where there is more individual choice, but that choice is channeled, or guided, by governmental nudges rather than by hard governmental shoves.³¹

The movement from the 1911 regime dominated by governmental coercion (hard shoves) to the 2011 regime dominated by guided choice (gentle nudges) has involved both deregulatory moves by the state and new regulatory moves by the state. The best-known features of the legal revolution are deregulatory and pluralistic. In the last century, government in this country has revoked traditional prohibitions and opened up new options for romantic couples. Among the deregulatory moves in family law are the following:

- Decriminalizing nonmarital sexual activities, through the repeal or nullification of laws forbidding fornication and adultery;³²
- Decriminalizing nonprocreative sexual activities, through the repeal or nullification of laws forbidding contraceptives, consensual sodomy, and oral sex between consenting adults, as well as abortions desired by pregnant women;³³

31. The account in this Part is similar to that developed in broader strokes by other scholars. I am particularly indebted to COTT, *supra* note 26, and Schneider, *supra* note 19.

32. See, e.g., RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 98–110 (1996) (documenting the declining number of states that still criminalized fornication and adultery as of 1996). For a more detailed account, see *infra* section II.C.

33. See WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003*, at 387–407 app. (2008) (surveying the decline and fall of consensual sodomy and oral-sex prohibitions); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994) (chronicling decriminalization of contraception and abortion); ANDREA TONE, *DEVICES AND DESIRES: A*

- Allowing divorce and dissolution of legal unions without showings of fault and, increasingly, at the behest of only one spouse;³⁴
- Enforcing antenuptial agreements, thereby allowing married couples to contract around many of the requirements of marriage and divorce law;³⁵
- Sweeping away discriminations against nonmarital children;³⁶ and
- Accommodating private nontraditional procreation, namely, surrogacy, artificial insemination, and adoption.³⁷

These changes have been deregulatory in the relative sense that American government has revoked or narrowed most forms of previous regulation—but the state has not eliminated all forms of regulation and, indeed, has created new forms of regulation. For example, the repeal of antifornication laws has meant that the state no longer criminalizes nonmarital penile–vaginal sex per se, but the state still regulates penile–vaginal sex through increasingly detailed sexual-assault laws.³⁸ Overall, though, state criminal law regulates a narrower range of private sexual conduct today than it did a century ago.

At the same time that American governmental units were backing away from coercive laws imposing hard rules on romantic couples, they were offering choices that entailed new forms of regulation. Couples who were literally outlaws in 1911 because their unions were criminal are today within the law—including various gentler forms of legal regulation. Thus, state regulation of family choices remains pervasive, but its characteristic modalities have changed. Regulation today is more likely to be through choice-friendly opt-in/opt-out regimes that offer benefits to couples in return for state regulation or

HISTORY OF CONTRACEPTIVES IN AMERICA 238–39 (2001) (discussing the decriminalization of contraception for both married and unmarried individuals). For a more detailed account, see *infra* section II.C.

34. See ALLEN M. PARKMAN, *GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY* (2000) (providing history of modern no-fault divorce laws); Ira Mark Ellman & Sharon L. Lohr, *Dissolving the Relationship Between Divorce Laws and Divorce Rates*, 18 INT'L REV. L. & ECON. 341, 347–48 tbl.1 (1998) (providing chart of state divorce reform with accompanying dates). For a more detailed account, see *infra* section II.B.

35. See *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2075–98 (2003) (discussing the future of antenuptial agreement law). For a more detailed account, see *infra* section II.A.3.

36. The Supreme Court has invalidated many of the discriminations against nonmarital children. See Christine H. Kellett, *The Burger Decade: More Than Toothless Scrutiny for Laws Affecting Illegitimates*, 57 U. DET. J. URB. L. 791, 798–806 (1979) (defly analyzing the Court's constitutional decisions regarding illegitimate children from 1969–1979). For a more detailed account, see *infra* section II.C.

37. See, e.g., JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 98–100 (1994) (discussing in vitro fertilization); Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2012) (discussing the effect of new reproductive technologies on kinship and families); Darra L. Hofman, *"Mama's Baby, Daddy's Maybe": A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 460 (2009) (discussing surrogacy). For a more detailed account, see *infra* section III.B.3.

38. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 793–95 (1988) (detailing the expansion of sexual-assault laws as based on parties' consent). For a more detailed account, see *infra* sections II.A.2.b and II.C.1.b.

guidance. Among the proregulatory moves American governments have made in the last century are the following:

- Expanding the range of couples eligible to marry to include different-race couples, many previously excluded persons with disabilities, and, increasingly, same-sex couples, thereby extending the highly regulatory regime of marriage rules to these sexual couples who had previously been family outlaws;³⁹
- Expanding state regulation, within marriage as well as within other relationships, to protect the liberty and well-being of individual family members, including rights of spouses to say no to sexual intercourse;⁴⁰
- Recognizing rights of children, not only to support, but also to nurturing care from nonbiological parental figures;⁴¹
- Recognizing specific rights and duties of unmarried but cohabiting partners, including rights to support under a broader range of circumstances, to be free of domestic violence, and to have access to state mediation services for domestic disputes;⁴²
- Creating new institutional forms of relationship recognition, including domestic partnerships, reciprocal beneficiaries, and civil unions;⁴³ and
- Providing benefits to families in need but with strings attached that have afforded the state new opportunities for incentive-based regulation of family formation.⁴⁴

39. See generally KENNEDY, *supra* note 8 (providing survey of the repeal and eventual national nullification of state laws barring different-race marriages by 1967); ESKRIDGE & HUNTER, *supra* note 8, at ch. 6 § 2 (providing survey of the repeal of state laws barring same-sex marriages circa 2011). For a more detailed account, see *infra* sections II.A.1 and II.C.1.

40. See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1380, 1484–85 (2000) (discussing the slow reform of state marital-rape exemptions, albeit frequently replaced with partial “allowances” for conduct in marriage that would be considered rape outside of marriage). For a more detailed account, see *infra* sections II.A.2.b and II.C.1.a.

41. See generally Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990) (arguing for the importance of caregivers for children and the utility of two-parent lesbian households). For a more detailed account, see *infra* sections II.C.1.a and III.B.2.

42. See generally Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 L. & POL’Y 119 (2004) (providing survey of cohabitation law as of 2004). For a more detailed account, see *infra* section II.C.1.

43. See ESKRIDGE, *supra* note 23 (providing survey of early civil-union, domestic-partnership, reciprocal-beneficiary laws in North America and Europe circa 2002); ESKRIDGE & HUNTER, *supra* note 8, at ch. 6 § 2 (providing more recent survey circa 2011). For a more detailed account, see *infra* section II.C.2.

44. See Hasday, *Canon*, *supra* note 10, at 875–77 (analyzing federal social security as a form of family law), 893–98 (analyzing federal welfare law as a more coercive form of family law). For a more detailed account, see *infra* section II.A.

Guided choice has been, in this manner, double-edged. Romantic couples now have more choices they can make—whether to get married, whether to engage in family-planning methods to limit the number of children, whether to end the marriage or other relationship and on what terms—but some of the new choices they can make entail acceptance of an expanded state regulatory regime.

B. THE SOCIOLOGY OF FAMILY PLURALISM DRIVING THE GUIDED-CHOICE REGIME

The sociology of the foregoing evolution—the social and cultural changes that drove the changes in family formation and family law—is complicated,⁴⁵ but some important strands bear emphasis. To begin with, the overriding fact of family practice, custom, and law in the United States has been the fairly steady decline in fertility and family size from the eighteenth century until the present.⁴⁶ That fact has opened up more opportunities for women in general and helps explain the success of American feminism, a social movement that won important legal victories in the nineteenth century, including the enactment of laws vesting wives with economic rights to hold property, enter contracts, and initiate lawsuits without their husbands' permission.⁴⁷

Thus, scholars Carl Degler, Herma Hill Kay, and Katharine Bartlett are surely right to say that changes in American family law have been driven in critically important ways by women's assertions of their individuality and independence in both public and private spheres of American life.⁴⁸ Even in the nineteenth century, our culture and law contemplated relationships as more companionate than European law and culture considered them.⁴⁹ In the twentieth century, women's increasing opportunities outside the home and their growing economic power have strongly contributed to the lower birth rates, lower marriage rates, and higher divorce rates in the last generation, compared with those of the early twentieth century.⁵⁰

The women's movement is *not* the only social movement that has significantly affected American family life and family law, however. Against the

45. For some leading explications, see CHERLIN, *supra* note 19; COTT, *supra* note 26; DiFonzo, *supra* note 5; and Schneider, *supra* note 19.

46. See CAROLE SHAMMAS, A HISTORY OF HOUSEHOLD GOVERNMENT IN AMERICA 186–87 app. (2002).

47. See NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 162–66, 224–25 (1982); ELIZABETH BOWLES WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800–1861, at 248–91 (1987).

48. CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT (1980); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2019–20 (2000); see also Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475 (1999) (providing an excellent account of the important role that feminist critiques and women's political power have played in a variety of family law reform movements).

49. See Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1397 (1983) (demonstrating that American law and culture more readily addressed changing family dynamics, by increasing protections for women and removing impediments to property transfer, than did English law and culture in the eighteenth and nineteenth centuries).

50. SHAMMAS, *supra* note 46.

background of declining fertility and family size, other social movements have advanced ideas inconsistent with the old Anglo-American common law of the family. By challenging antimiscegenation social mores and laws, the civil rights movement contributed decisively to the “de-raceing” of cohabitation and marriage laws, an expansion of family law that has grown in social importance over time.⁵¹ The disability rights movement has challenged, with some success, exclusions of people with certain disabilities from civil marriage.⁵²

Although representing fewer Americans than the women’s, the civil rights, or the disability rights movements, the rights movement propelled by gay, lesbian, bisexual, and transgender (LGBT) persons has been the most significant in some symbolic respects. Today, the LGBT rights movement is accused of unsettling American family law because of its demand for marriage equality, but the importance of that social movement long precedes the recent attention to gay marriage. Lesbian and gay couples have for some time been socially important (well beyond their numbers) shock troops for the larger revolution in American families and their legal regulation. Gertrude Stein and Alice B. Toklas, for example, were among the earliest American role models for sexual cohabitation; their well-publicized committed relationship flouted natural law norms yet was a source of happiness for both partners and was a partnership with larger cultural value as well.⁵³

The most important way in which the efflorescence of lesbian and gay communities has contributed to changes in American family law has been the new social reality presented by committed lesbian and gay couples who are rearing children: these “families of choice” inherently disassociate the sexuality that seals the couples’ relationships from procreation of the children that those couples are rearing. This intrinsic feature of lesbian and gay relationships helps us understand why many traditionalists who believe that LGBT persons should not be subject to state discrimination have also opposed gay marriage: what those traditionalists consider most important about marriage—its wedding of

51. See Brief of the NAACP as Amicus Curiae at 1–6, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) (describing the campaign to repeal antimiscegenation laws and arguing that their invalidation was essential to confirm the antiracism agenda of the Court’s civil rights precedents).

52. See ALLISON C. CAREY, *ON THE MARGINS OF CITIZENSHIP: INTELLECTUAL DISABILITY AND CIVIL RIGHTS IN TWENTIETH-CENTURY AMERICA* 157–59, 172–73, 188 (2009); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 197–98 (1994). For an early account of the disability rights movement and the constitutional issues arising from exclusions of individuals with disabilities from marriage, see SARAH F. HAAVIK & KARL A. MENNINGER, II, *SEXUALITY, LAW, AND THE DEVELOPMENTALLY DISABLED PERSON: LEGAL AND CLINICAL ASPECTS OF MARRIAGE, PARENTHOOD, AND STERILIZATION* 1–2, 33–41 (1981).

53. STEPHEN O. MURRAY, *AMERICAN GAY* 167 (1996). For contemporary accounts of Gertrude Stein and Alice B. Toklas’s cohabitation and relationship see, for example, Fanny Butcher, *The Literary Spotlight*, CHI. DAILY TRIB., Sept. 2, 1945, at D13 (describing how Stein and Toklas financed their apartment and life together), and Leonard Lyons, *Broadway Bulletin*, WASH. POST, Nov. 25, 1941, at 22 (reporting that Stein and Toklas lived together in a “secluded villa” in Aix-les-Bains during World War II); see also David Edstrom, *Why Gertrude Stein Is What*, L.A. TIMES, Apr. 14, 1935, at K3 (describing Toklas and Stein as “inseparable” and noting “Toklas’s deep and ardent affection for [Stein]”).

commitment, sexuality, and procreation—is the one thing that gay marriage cannot be.⁵⁴

C. THE NORMATIVE (UTILITARIAN) FOUNDATION FOR THE
NEW GUIDED-CHOICE REGIME

What lesbian and gay couples best exemplify is what American couples of all orientations have been doing and thinking increasingly in the last century: separating sexuality from procreation. The big change in public attitudes driving the evolution of American family law in the last century has been the decline of the *natural law understanding* of romantic relationships and its substantial displacement in public discourse by a *utilitarian understanding*.⁵⁵

What I am calling the natural law understanding is a religious understanding of human relationships, or a similar vision supported by secular natural law philosophy.⁵⁶ Under such a natural law approach, sex is both a dangerous and a generative force that must be strongly directed by society, religion, and the state, working closely together. What morally justifies sex is the marital procreation that creates families, undergirds society and the state, and propagates the human race. Thus, according to this philosophy, penile–vaginal intercourse is the proper form of sexual activity, and civilizing, domesticating marriage is the forum in which that activity must take place.

Contrary to the natural law vision, the utilitarian understanding of romantic relationships posits that pleasure, sociability, and collective advancement to be moral justifications for sexual activities.⁵⁷ Everyone's sexuality is distinctive

54. See, e.g., Wardle, *supra* note 11 (arguing that the essence of marriage, and the source of its utilitarian benefits, is its “gender-integrative” feature). But cf. WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 8, 104 (1996) (arguing that “gay marriage” is instructive for both gays and straights, partly because it destabilizes traditional gender roles).

55. For excellent treatments that anticipate my distinction, but at different levels of abstraction and with different terminologies, compare CAHN & CARBONE, *supra* note 7 (tracing the contested ascendancy of “blue [state] marriage” reflecting the individualist assumptions of my utilitarian model); Andrew J. Cherlin, *The De-institutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848 (2004) (tracing the decline of “institutional” marriage to “companionate” marriage, and then a further movement toward “individualized” marriage); Schneider, *supra* note 19 (tracing the displacement of the moralistic model by one that emphasizes individual flourishing).

56. Leading modern statements of the natural law understanding must start with GERMAIN G. GRISEZ, THE WAY OF THE LORD JESUS, VOLUME 2: LIVING A CHRISTIAN LIFE 633–56 (1993) (presenting a theological perspective on marriage that the author, an eminent theologian, maintains can be generalized) and prominently include ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999), and John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97 (1997). An excellent law review treatment, with lessons for legal policy, is Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995).

57. Leading statements of the utilitarian understanding start with Jeremy Bentham, *Essay on Paederasty* (1785), published in 3 J. HOMOSEXUALITY 389, 389–405 (1978), and 4 J. HOMOSEXUALITY 91, 91–107 (1978). For leading twentieth-century thinkers advancing the same point of view as Bentham to a wide audience, see PAUL ROBINSON, THE MODERNIZATION OF SEX: HAVELOCK ELLIS, ALFRED KINSEY, WILLIAM MASTERS AND VIRGINIA JOHNSON (1989).

and important to that person; most sexual variation is benign. Indeed, sexuality without procreation is personally and socially productive, especially if channeled in the right ways. In the twentieth century, Sigmund Freud influentially articulated the notion that sexuality and relationships should be understood in utilitarian rather than natural law terms.⁵⁸ He maintained that sexuality is both a positive and a dangerous force within us all; one's sexuality is distinctive to her or his personhood, and a "repressed" sexuality is the source of neuroses and other maladies—yet a healthy sexuality could be the source of great happiness.⁵⁹ Freud spent much of his career trying to persuade people not to make such a big deal out of sexual variety and to help people come to terms with their sexual fantasies.⁶⁰

In the United States, such a sex-positive utilitarian theory was popularized by authors such as Margaret Sanger, who extolled marriage as a situs of sexual pleasure and happiness.⁶¹ Americans took to this theory like ducks to water. In the course of the twentieth century, Americans gradually minimized sex for marital procreation and increasingly admitted that they enjoy sex for reasons of pleasure or sociability. Thus, the Kinsey reports of 1948 and 1953 documented that Americans were no longer conforming their private behavior to the natural law ideal reflected in the criminal law; that is, the law channeled sexual activities into procreative marriage, but Americans derived much of their sexual satisfaction from nonprocreative or nonmarital activities.⁶² In light of the Kinsey data, it appears that the great "sexual revolution" of the 1960s was a

58. On Freud's thought and its reception in the United States, see NATHAN G. HALE, JR., *FREUD AND THE AMERICANS: THE BEGINNINGS OF PSYCHOANALYSIS IN THE UNITED STATES, 1876–1917* (1971).

59. See SIGMUND FREUD, *The Sexual Aberrations*, in *THREE ESSAYS ON THE THEORY OF SEXUALITY* 1, 16–19, 33–35 (James Strachey ed. & trans., 1962) (radically arguing that so-called "perversions" such as oral sex are interconnected with procreative intercourse valorized by the natural law tradition).

60. See, e.g., *id.* at 4–5 (arguing that homosexuality "cannot be regarded as degenerate" for several reasons, including its presence in those with "no other serious deviations from the normal"); Letter from Sigmund Freud to an American Mother (Apr. 9, 1935) (instructing the mother, who was concerned about her son, that homosexuality is no "illness" and is nothing more than a "variation of the sexual function") (photograph of original letter available at <http://www.loc.gov/exhibits/freud/images/vc008481.jpg> (page one) and <http://www.loc.gov/exhibits/freud/images/vc008482.jpg> (page two)) (copy of text available at <http://www.fordham.edu/halsall/pwh/freud1.asp>).

61. See MARGARET SANGER, *HAPPINESS IN MARRIAGE* 6, 20–23, 137–146 (1926) (emphasizing sexual pleasure as a feature of marriage); see also FLOYD DELL, *LOVE IN THE MACHINE AGE: A PSYCHOLOGICAL STUDY OF THE TRANSITION FROM PATRIARCHAL SOCIETY* 6–7 (1930) (similar). On the increasing popularity of a sex-for-pleasure (that is, utilitarian) approach in the course of the century, see generally BETH L. BAILEY, *FROM FRONT PORCH TO BACK SEAT: COURTSHIP IN TWENTIETH-CENTURY AMERICA* (1988); ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 38–39 (rev. ed. 1992); JOHN MODELL, *INTO ONE'S OWN: FROM YOUTH TO ADULTHOOD IN THE UNITED STATES 1920–1975* (1989).

62. See ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 392 (1948) [hereinafter KINSEY ET AL., MALE] (reporting that 85% of American white males had engaged in fornication, 30–45% had committed adultery, 59% had engaged in oral sex, and 70% had illegally patronized sex workers, as well as 17% of farm boys had engaged in illegal sex with animals); ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 257–58, 280–81, 286, 416 (1953) [hereinafter KINSEY ET AL., FEMALE] (reporting that nearly half of American women had engaged in fornication, more than one-quarter had committed adultery by age forty, and more than one-third of sexually experienced women had engaged in oral sex).

continuation of behavioral trends that started much earlier—but was particularly important insofar as that decade saw the utilitarian understanding “coming out of the closet” and asserting its power openly among American youth.⁶³ Today, political conservatives join liberals in asserting that pleasure and sociability are legitimate moral justifications for sexual activities.⁶⁴

The ascendancy of the utilitarian understanding of romantic relationships has placed pressure on American family law to be more pluralistic, namely, to tolerate more sexual interactions and relationships outside of traditional marriage. Although the law has lagged behind social attitudes, it has responded: family pluralism has generated pressure for family law pluralism. Thus, the normative baseline of American family law has moved away from an exclusive focus on civil marriage, restricted to “pure” couples and celebrated as a lifetime status, and toward a more pluralist regime offering romantic couples more choices—including whether to marry, what rights each spouse enjoys during the marriage, when to end the marriage, and what relationship options are available outside of marriage.

The triumph of the utilitarian perspective has eclipsed but not eliminated the natural law perspective. Happiness or social utility has become the lingua franca of public policy discourse, and the Supreme Court has all but ruled that natural law morality alone cannot be the rational basis needed to justify laws discriminating against sexual minorities.⁶⁵ This is a good development, for civil society needs a common metric for evaluating arguments about what regulations and goals our society should be adopting.⁶⁶ But many Americans are still motivated by natural law, especially religious, commitments—and their utilitarian arguments inevitably reflect those underlying commitments.⁶⁷ In short, the natural

63. Between 1963 and 1979, Americans, especially the young, openly accepted the legitimacy of sex for pleasure, including nonprocreative sex and, increasingly, sex outside of marriage. *See* CATHERINE S. CHILMAN, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, PUB. NO. 79-1426, *ADOLESCENT SEXUALITY IN A CHANGING AMERICAN SOCIETY: SOCIAL AND PSYCHOLOGICAL PERSPECTIVES* 67–90, 103–80 (1978); *see also* DAVID ALLYN, *MAKE LOVE, NOT WAR—THE SEXUAL REVOLUTION: AN UNFETTERED HISTORY* 3–40 (2000) (tracing the so-called “sexual revolution,” as propelled by a changing society and culture, through the 1960s to mid-1970s).

64. *See, e.g.*, MARK REGNERUS & JEREMY UECKER, *PREMARITAL SEX IN AMERICA: HOW YOUNG AMERICANS MEET, MATE, AND THINK ABOUT MARRYING* ch. 6 (2011) (positing that both “red state” and “blue state” sexuality is understood by young people as centered on mutual pleasure for the partners; the main difference is that red state sexuality considers marriage a more urgent priority for sexual partners); RICHARD A. POSNER, *SEX AND REASON* 111–45 (1992) (announcing an economic theory of sexuality, premised upon the assumption that the legitimate goals for sex include pleasure and sociability, as well as procreation).

65. *See* *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment); *Romer v. Evans*, 517 U.S. 620, 633–36 (1996); *see also* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1234–36 (2004) (demonstrating that even before *Romer* and *Lawrence*, the Supreme Court had never justified a discriminatory law as rational when it was based only on morality).

66. *See* JOHN RAWLS, *POLITICAL LIBERALISM* (1992) (making this point).

67. Thus, in *It Takes a Family*, then-Senator Santorum, who wears his fundamentalist religion on his sleeve more than any other prominent politician, opposed gay marriage not because it contravenes natural law and the Word of God (which appears to be Santorum's underlying belief), but instead

law understanding survives, but it is usually expressed in utilitarian terms and has acquiesced in many of the utilitarian policy innovations, such as decriminalization of fornication and sexual cohabitation, as well as easier rules for divorce.

In the century witnessing the rise of a utilitarian understanding of familial relationships, American family law has become decidedly more prochoice but has hardly abandoned legal regulation of such relationships. As a theoretical matter, the utilitarian understanding of family suggests a potentially active role for government, which can and should (1) offer efficient off-the-rack rules, namely, those that couples would probably have chosen but do not go to the trouble of formalizing in the necessary legal documents like wills, powers of attorney, and the like; (2) provide useful information and other guidance to romantic couples making their choices; and (3) protect third parties, such as children, whose interests might be harmed by choices that fail to consider their legitimate interests.⁶⁸ This last point is worth considerable emphasis: the utilitarian perspective not only considers the interests (utilities) of children, but provides a strong basis for legal protection because adult decision makers (parents) sometimes sacrifice the interests of their children for their own happiness, a sacrifice that often undermines the greatest good for the greatest number. Thus, from a utilitarian as well as natural law perspective, family law *ought* to be centrally concerned about the best interests of children as well as of romantic partners who are their parents.

II. MENUS, DEFAULT RULES, AND OVERRIDE RULES—AND THREE REVOLUTIONARY DEVELOPMENTS IN AMERICA'S INCREASINGLY PLURALIST FAMILY LAW, 1911–2011

Consider how the foregoing historical account of the modern guided-choice regime can be conceptualized; this conceptualization, in turn, helps us understand the nature of the guided-choice revolution in American family law during the last century. Additionally, the conceptualization that follows will reveal the deeper patterns of change that the gay-marriage debate has dramatically exposed and is now accelerating.

Drawing from contract-theoretic terminology developed by Ian Ayres and Robert Gertner,⁶⁹ the following vocabulary is useful in conceptualizing the

because it will reduce the overall happiness and flourishing of straight couples and their children. *See* Santorum, *supra* note 11. Likewise, Professor Wardle, a devout Mormon who speaks for many Americans who support natural law baselines as a matter of religious faith, defends traditional marriage in law review articles primarily along utilitarian lines. *E.g.*, Wardle, *supra* note 11; Wardle, *supra* note 20.

68. *Cf.* SCHNEIDER & BRINIG, *supra* note 24, at 211–21, 1386–96 (providing more elaborate but similar articulation of the purposes served by family law). Moreover, regulation continues to reflect or echo traditionalist baselines grounded upon the natural law understanding. *E.g.*, Hasday, *Canon*, *supra* note 10. That so many Americans accept the utilitarian values of sexual expression does not mean that the natural law values have been completely eclipsed. The ongoing, and still intense, gay-marriage debate is testimony to the continued robustness of the natural law understanding.

69. *See* Ayres & Gertner, *supra* note 21 (leading article on default rules and consent-based overrides); *see also* Ayres, *Altering Rules*, *supra* note 21 (focusing on “altering rules,” which I think are better termed override rules); Ayres, *Menus Matter*, *supra* note 21 (focusing on menus).

regulatory changes in family law during the last hundred years:

- *Mandatory rules*, namely, rules or directives that parties (in this case, the romantic couple or either individual) cannot change and must accept as binding upon their decisions;
- *Default rules*, namely, rules or directives that parties (the couple) can change, usually by contracting around the default; and
- *Override rules*, namely, the legal steps or requirements that the parties (the couple) must follow or meet to contract around or otherwise override the relevant legal default rules.

In the language of this terminology, American family law in 1911 was dominated by mandatory rules—including rules defining strict roles within marriage (section A), vesting civil marriage with monopoly authority over sexual activities (section B), and limiting divorce (section C)—and the last century has seen most of those mandatory rules disappear and be replaced by default-with-override rules (a process tracked in the three sections just noted).

Although mandatory rules have steadily declined, our pluralist family law still does a lot of regulatory work, consistent with the efficiency, guidance, and third-party-effect goals suggested by the utilitarian perspective. Following from the contract theory explored here, the normative weight of American family law is exercised in three ways. First, the norms that were once mandatory are now usually defaults, but that means they are still binding until the partners have overridden them. So the default norm has a regulatory effect—as does the precise override rule. For example, a *hard default*, namely, a default that is difficult to override, is not much different in practice than a soft mandatory rule, namely, a mandatory rule that is easily evaded by romantic couples. Figure 1, below, is a simple diagram of the range of regulatory options, all within the standard menu for regulating contracts.

Figure 1. A Continuum of Regulatory Rules

MANDATORY RULE	HARD DEFAULT	ORDINARY DEFAULT	SOFT DEFAULT	NO RULE
Parties are bound.	Parties can override, but not easily.	Parties can override by explicit consent.	Parties can override by implicit or explicit consent.	Parties decide.

Defaults, even ordinary or soft defaults, can guide a couple's decision making, and they may do so more efficiently than mandatory rules, because they provide guidance but leave the decision to the parties (the couple) best able to balance the advantages and disadvantages of the different relationship choices. Even protection of third-party interests may be better served by default-with-override rules, because they better balance the interests of the couple, their children, and

other third parties than mandatory rules tend to do.

Second, the law's regulatory effect today is more often accomplished through "carrots" than through "sticks." American family law still encourages marriage and committed relationships but has substantially abandoned deterrence by means of criminal sanctions—the harshest sounding mandatory rules that are often ineffective in practice—and now encourages such relationships more through positive *incentives*. The biggest incentive is an amalgam of legal and business practices: since World War II, private and public employers have offered workers health-insurance packages that cover their spouses and children as well.⁷⁰ For that reason, health insurance is a powerful reason to get married or (nowadays) to become a domestic partner. Many important government benefits, ranging from immigration preferences to social-insurance benefits, are tied to marriage as well. The guidance function of law is often best served by positive incentives rather than default-with-override rules.

Third, American family law has replaced its marriage-only regime with an evolving *menu* of relationship options recognized and regulated by law (usually default and override rules rather than mandatory rules). The menu itself has regulatory effects. One set of effects is more efficient decision making: the romantic couple disinclined to create legal documents can opt into entire packages of rights and duties by signing onto a regime within the family law menu; because most of the rules within each regime are defaults rather than mandatory rules, the motivated couple can then opt out of most items within each regime. Another set of effects involve guiding or channeling: romantic couples now understand, to some extent, the legal effects not only of marriage but also of cohabitation and of domestic partnership. The decision to cohabit or marry is made in the shadow of the law, and the couple is sometimes guided by the law's regulation when they decide the level of relational commitment in which they want to engage. Another effect derives from the precise mix of recognized institutions and the incentives and default/override rules each institution carries with it.

Consider now the history of American family law in the last hundred years. This period has witnessed three doctrinal revolutions that have accommodated the preferences of functioning families. The changes in legal regulation can be fruitfully understood within the default–override–menu vocabulary of contract law.

A. MARITAL CHOICE: REPLACING MANDATORY RULES WITH DEFAULT RULES AND INCENTIVES

As the Supreme Court put it in a leading nineteenth-century case, when a couple marries, "a [legal] relation between the parties is created which they

70. Between 1940 and 1950, the number of Americans covered by private health insurance increased from 20 million to more than 140 million. David Blumenthal, *Employer-Sponsored Health Insurance in the United States—Origins and Implications*, 355 NEW ENG. J. MED. 82, 83 (2006).

cannot change.”⁷¹ American family law in 1911 revolved around one institution—marriage—and barricaded that institution with many mandatory rules that the spouses could not contract around or that were so hard to override that they were mandatory in practice for most Americans. The old common law of marriage, a natural law regime that understood marriage as creating a union of two individuals whose goal was to procreate and rear the couple’s biological children, was the source of most of these mandatory rules.⁷²

Mandatory rules policed entry into the institution of marriage, effectively constructing that civil institution as one limited to “pure” couples whose progeny would contribute to a healthy body politic. Thus, most states at one time barred different-race couples from marrying,⁷³ and almost all states in the twentieth century added restrictions to prevent “mentally retarded” persons from getting married and reproducing.⁷⁴ These were mandatory rules, as stated above, but in the course of the twentieth century, they became *soft mandatory rules* that private parties could evade or get around as a matter of practice. Thus, many different-race couples secured marriage licenses, contrary to the law of their domicile, because one partner could pass as the same race as the other partner, because marriage license officials would look the other way, or because they could travel to another state and get legally married.⁷⁵ Figure 2 maps a typology of mandatory rules along these lines.

Figure 2. A Continuum of Mandatory Rules

HARD MANDATORY RULES	ORDINARY MANDATORY RULES	SOFT MANDATORY RULES
State seriously enforces; parties pay careful attention.	State enforces episodically; party obedience uneven.	State does not enforce; parties ignore.

For the “pure” couples allowed to marry, the state imposed mandatory rules of sexual fidelity and sexual privacy, mutual support, parentage and its responsi-

71. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

72. On the common law of marriage, and its emphasis on “coverture” of the wife’s legal personality by that of the husband, see HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000). On the perseverance of coverture-inspired family law rules or norms even in the present, see, for example, Hasday, *Canon*, *supra* note 10, at 841–48.

73. See Brief of the NAACP as Amicus Curiae, *supra* note 51, at 1–3 & n.2.

74. Thus, as late as the 1960s, thirty-nine states broadly excluded persons with mental disabilities from marrying. See AM. BAR FOUND., *THE MENTALLY DISABLED AND THE LAW* 226–29, 240–43 (Samuel J. Brakel & Ronald S. Rock eds., 1971); HARRY BEST, *PUBLIC PROVISIONS FOR THE MENTALLY RETARDED IN THE UNITED STATES* 121–22 (1965).

75. As Andy Koppelman has demonstrated, the courts of the domicile would sometimes recognize these evasive marriages under certain circumstances. See ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 28–30, 36–50 (2006).

bilities, and the like.⁷⁶ There were some default rules as well, but they tended to be hard default rules, that is, default rules that are more difficult if not practically impossible to override. For example, state and federal courts recognized a testimonial privilege barring a spouse from testifying against another spouse; the spousal privilege could be waived if both spouses agreed, a tough override rule because the nontestifying spouse usually had a strong interest in vetoing testimony that would harm her or his interests.⁷⁷ As this example shows, soft mandatory rules were probably more accommodating in practice than many of these hard default rules.

In the ensuing century, easier-to-override default rules replaced mandatory or hard default rules as the baseline for American marriage law. The old mandatory as well as hard default rules have been superseded by default rules that are much easier to override. Although marriage law remains highly regulatory, its regulatory punch derives more from positive incentives and default-with-override rules, rather than from absolute state mandates.

1. Mandatory Rules Restricting Entry into Marriage

One of the biggest changes in American family law in the last century was opening up civil marriage to more couples. This is the arena where the role of social movements outside of women's rights has been most evident. A society growing to understand marriage as grounded in mutual pleasure and friendship finds it increasingly difficult to exclude interracial couples, disabled persons, or lesbian and gay couples, once their associated social movements have documented these couples' capacity for love and commitment and their ability to raise children within their families of choice. As social movements demanded that outsider relationships be accorded the same legal treatment as relationships the law traditionally privileged, the government has expanded the definition of marriage to accommodate these couples. American family law grew steadily more pluralist in the two generations following World War II, the period when their social movements flourished.⁷⁸

a. Different-Race Couples. Thirty states barred different-race couples from marrying in 1948,⁷⁹ the year the California Supreme Court struck down its

76. These were inspired by the natural law/common law understanding of the married couple as a unity.

77. See *Hawkins v. United States*, 358 U.S. 74, 77–78 (1958), *overruled by* *Trammel v. United States*, 445 U.S. 40, 53 (1980) (modifying the common law rule and allowing spouses to testify if they choose in federal proceedings).

78. For an overview of the civil rights, disability rights, and gay rights movements after World War II and the process by which those movements transformed American law, see William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

79. See *Perez v. Lippold*, 198 P.2d 17, 38 (Cal. 1948) (Shenk, J., dissenting). For the thirty-state count, see FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, & AMERICAN LAW* 156 (2009); and KENNEDY, *supra* note 8, at 258–59.

antimiscegenation law.⁸⁰ A number of states also barred sexual cohabitation between persons of different races. These racially discriminatory statutes were grounded upon the natural law idea that the “white race” ought not to be “diluted” through procreative marriages or cohabitation with persons of different races.⁸¹ Against this politics of purity, the civil rights movement argued that the state should not withhold marriage recognition for mutually committed relationships and that the case for antimiscegenation laws rested upon race-based prejudice that could not be credited in a modern polity.⁸²

In the wake of the civil rights movement’s triumph in the desegregation cases, every state that still had an antimiscegenation law outside the South repealed its exclusion in the decade following 1955.⁸³ In 1964, the Supreme Court struck down a Florida law criminalizing interracial cohabitation,⁸⁴ and in 1967, the Court in *Loving v. Virginia* struck down the seventeen remaining state laws that refused civil marriage to different-race couples.⁸⁵ Accordingly, romantic couples of different races saw their rights transformed between 1955 and 1967: the mandatory rule against state recognition of their marriages was replaced by a default rule with an easy override, namely, such a couple could change its default status from unmarried by securing the same marriage license and having the same ceremony as same-race couples.

The *Loving* Court recognized a “fundamental” right to marry, which rested in part on the natural law premise that everyone ought to procreate within marriage.⁸⁶ At the very point the Court was invoking the natural law understanding of family to anchor important personal rights, the nation’s public discourse (influenced by the sexual revolution) was turning toward the utilitarian understanding of family. The Supreme Court applied that new understanding twenty years after *Loving* in *Turner v. Safley*.⁸⁷ A unanimous Court extended *Loving*’s fundamental right to marry to prisoners, some of them incarcerated for life and therefore unable sexually to consummate marriages.⁸⁸ Those prisoners could never enjoy the natural law consummation of their marriages—hence, their

80. See *Perez*, 198 P.2d at 29.

81. *E.g.*, *Naim v. Naim*, 87 S.E.2d 749 (1955) (announcing natural law reasons for criminalizing different-race marriages, in language that sounds incredibly racist today). On the religious/natural law argumentation in favor of such statutes, see Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, as well as William N. Eskridge Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct To Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657 (2011).

82. Brief of the NAACP as Amicus Curiae, *supra* note 51, at 2–6 & app.

83. See *id.* at 2–3 & nn.1–2 (listing the states with antimiscegenation laws in 1966 and the states that had repealed their laws from 1955 to 1965).

84. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

85. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

86. *Id.* at 12 (relying on *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down a state sterilization law on the ground that it deprived men of their “fundamental” right to procreate and marry)).

87. *Turner v. Safley*, 482 U.S. 78 (1987).

88. *Id.* at 94–97.

marriages were like gay marriages in their intrinsic lack of connection between marriage, sex, and procreation—yet the Court insisted that the state must allow them to marry.⁸⁹ Justice O'Connor's opinion for the Court emphasized that the utilitarian advantages of marriage, including social and legal benefits that committed relationships offered romantic couples, justified invocation of marriage rights by prison inmates.⁹⁰

b. Persons with Mental Disabilities. Within the natural law understanding, updated by the same eugenics-based science that justified antimiscegenation laws, Americans in the early twentieth century believed that procreative marriage ought not to be available to persons with mental disabilities because their progeny (like that of mixed-race couples) would be adulterated.⁹¹ The ascendancy of the utilitarian understanding and of a more sophisticated science of genetics discredited most of the early eugenics statutes, especially those requiring the sterilization of so-called “retarded” persons.⁹² As a matter of political morality, the utilitarian understanding required the state to offer life opportunities to mentally disabled citizens, but within that understanding the state might also be concerned with marriages by persons incapable of making informed choices. Hence, the large majority of states have narrowed their rules against marriages by persons with mental disabilities, transforming mandatory rules against such marriages into default rules that could be overridden for marriages in the utilitarian interests of both partners.

For example, Minnesota prohibits “[d]evelopmentally disabled persons committed to the guardianship of the commissioner of human services” from marrying unless the commissioner provides his/her signed consent to the registrar issuing the marriage license.⁹³ Thus, the default rule for developmentally disabled persons, as a narrowly defined category of only those committed to the commissioner's guardianship, is the same as for other unmarried persons. The override rule for such developmentally disabled persons is somewhat higher, but not that much higher, as the statute says that the commissioner “shall” consent to the marriage *unless* he or she is persuaded that the marriage is not in the best interests of the conservatee or the public.⁹⁴

Nebraska still authorizes annulment if “[e]ither party was mentally ill or a person with mental retardation at the time of marriage.”⁹⁵ Thus, the default rule

89. *See id.*

90. *See id.*

91. *See* *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding Virginia's law requiring the sterilization of “feeble-minded” persons so that they could not reproduce).

92. *See* VICTORIA F. NOURSE, IN *RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* (2008) (providing historical context for the eugenics-based elaboration of natural law baselines, and the discrediting of that elaboration during the 1930s).

93. MINN. STAT. § 517.03(2) (2010).

94. *Id.*

95. *E.g.*, NEB. REV. STAT. § 42-374(4) (2011) (allowing persons who are mentally ill or have mental “retardation” to marry freely, but subjecting the marriage to potential annulment after the fact).

for mentally ill persons in Nebraska is the same as the default rule for other unmarried adults, and it is just as easy for a mentally ill person to override the default through marriage license and ceremony. Interestingly, the divorce rule is different for such persons—marriages with a mentally ill person can, in theory, be annulled at any time. Reflecting the influence of the utilitarian understanding, the Nebraska statute and others like it are almost never invoked.⁹⁶

c. Same-Sex Couples. Couples of the same sex were excluded from marriage by mandatory rules in all states in 1961. The exclusion of same-sex couples from civil marriage reflected the natural law understanding—closely linking marriage, procreation, and the rearing of one's biological progeny. Because lesbian and gay couples could not procreate between themselves, they naturally did not fit within the institution of marriage. Indeed, the natural law perspective considered "homosexual," and thus nonprocreative, intercourse itself a crime against nature; every state and the District of Columbia considered consensual sodomy a crime in 1961.⁹⁷

In the 1950s, criminal law reformers rejected the natural law understanding as the basis for sex-crime laws and developed the Model Penal Code, which openly followed the utilitarian understanding and, therefore, proposed that consensual fornication, adultery, and sodomy be decriminalized.⁹⁸ Between 1961 and 1976, almost half of the states decriminalized consensual sodomy,⁹⁹ and the LGBT rights movement became a modest but significant voice for further reform—ultimately including demands that LGBT persons be afforded equal marriage rights.¹⁰⁰ The case for marriage equality was entirely utilitarian: the state should be supporting the happiness of committed lesbian and gay couples, as well as the thousands of children many of those couples were rearing within their households.¹⁰¹

Since 2003, six states and the District of Columbia have extended marriage to such couples.¹⁰² In those marriage-recognition states, the mandatory rule against

96. See MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 11 & n.24 (1999) (noting that while statutes such as Nebraska's and a similar one in Minnesota are still "on the books," they are also unenforced).

97. See ESKRIDGE, *supra* note 33 (listing the sodomy law history for every state and the District of Columbia, with every state criminalizing consensual sodomy in 1961, though Illinois adopted a decriminalization law that would become effective in 1962).

98. See *id.* at 109–27 (documenting the utilitarian perspective of the Kinsey reports as the animating philosophy of the Model Penal Code).

99. See *id.* at 387–407 app. (listing the sodomy law history for every state and the District of Columbia).

100. See WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 44–62 (1996) (providing a history of LGBT demands for marriage equality).

101. See ESKRIDGE & SPEDALE, *supra* note 13 (drawing from personal interviews of committed lesbian and gay couples in the United States and Denmark, to support the idea that same-sex marriage offered many benefits to those couples, as well as benefits and no costs to the larger societies).

102. The state supreme courts of Connecticut, Massachusetts, and Iowa have recognized a right to same-sex marriage. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481–82 (Conn. 2008) (interpreting the state constitution "in accordance with firmly established equal protection principles" to

recognition of same-sex marriages has been revoked; the default and override rules for lesbian and gay couples are now the same as those for other couples. It is highly likely that the number of marriage-recognition states will continue to increase. Federal constitutional claims have been seriously pressed, most prominently in *Perry v. Brown*,¹⁰³ a case arising out of a federal constitutional challenge to voter override of a state supreme court decision extending marriage equality. At some point in the future, the Supreme Court will apply *Loving v. Virginia* and other right-to-marry precedents to overturn mandatory rules against state recognition of lesbian and gay unions.

Romantic couples who are different race or same sex, or who include a mentally disabled person, represent a growing percentage of married couples in America. For them, American family law has moved from a mandatory rule of exclusion to a default rule allowing the couples themselves, and not the state, to make the decision whether they should marry. This prochoice regime is more pluralist than the one in place a century ago, and this family law pluralism was a consequence of and, to a lesser extent, fueled the ascendancy of the utilitarian understanding of American family law.

This legal transition also illustrates the difference between a mandatory rule and a default rule and the important mediating role of override rules. Under

"lead[] inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice"); *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009) (invalidating law restricting marriage to heterosexual couples as a violation of equal protection under state constitution); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that denying "the protections, benefits, and obligations of civil marriage" to same-sex couples violates equal protection under the state constitution).

In the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington, same-sex marriage has been legalized through the legislative process. *See* D.C. Code § 46:01 (2011) (defining marriage as the "legally recognized union of 2 persons . . . regardless of gender"); Civil Marriage Protection Act, 2012 Md. Laws ch. 2 (repealing and reenacting with amendment current law to allow marriage between "two individuals who are not otherwise prohibited from marrying" including members of the same sex, effective Jan. 1, 2013), *available at* http://mlis.state.md.us/2012rs/chapters_noln/Ch_2_hb0438T.pdf; N.H. REV. STAT. ANN. § 457:1-a (2011) (recognizing marriage as "union of 2 people . . . regardless of gender"); N.Y. DOM. REL. LAW § 10-a (McKinney 2011) (recognizing otherwise valid marriages as valid "regardless of whether the [marital] parties . . . are of the same . . . sex"); VT. STAT. ANN. TIT. 15, § 8 (West 2011) (defining marriage as a "legally recognized union of two people"); Act of Feb. 13, 2012, 2012 Wash. Legis. Serv. Ch. 3 (West) (redefining marriage as "between two persons," effective June 7, 2012), *available at* <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Law%202012/6239-S.s.pdf>. The most recent laws, from Maryland and Washington, will likely be subject to popular referenda later in 2012 and might not go into effect if they are negated.

California recognized same-sex marriages in 2008, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), but state voters overrode these recognitions later that year in a popular initiative (Proposition 8) to amend the state constitution. *See* Cal. Const. art. I, § 7.5 (adopted 2008). This voter override (and amendment to the California Constitution) was subsequently declared unconstitutional in *Perry v. Brown*, 671 F.3d 1052, 1064–95 (9th Cir. 2012). Maine also recognized same-sex marriages by statute in 2009, but voters repealed the statute through voter referendum in the next general election. *See* Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Laws ch. 82, *available at* <http://www.mainelegislature.org/ros/LOM/LOM124th/124R1/pdf/PUBLIC82.pdf> (repealed Nov. 3, 2009, by People's Veto).

103. 671 F.3d 1052 (9th Cir. 2012).

both natural law and utilitarian regimes, the default rule is that the romantic couple does not get married. The old regime, governed by several mandatory rules, dictated that the couple could not override the default as a legal matter. The new regime, governed mostly by default rules, dictates that the couple may override the default rather easily and through the same process followed by all other couples (namely, by securing a marriage license).

2. Unitive Rules in Marriage

Another set of mandatory rules traditionally followed in American marriage law are *unitive rules*, those that enforce or reflect the assumption that a married couple operate as a unit or a team, whose interdependence should be respected by the government. The unitive rules reflected the natural law/common law understanding that procreative marriage obliterated the separate personhood of the individuals entering into it and created a family community headed by the husband. In the early twentieth century, most unitive rules were mandatory, while others were default rules with stringent override requirements. For example, many states in 1911 (and some states as late as 1934) followed the common law rule that wives could not enter into contracts without their husband's agreement; thus, the default rule for the wife was an inability to contract, but that default could be overridden by the husband's consent.¹⁰⁴

Starting in the nineteenth century and gaining overwhelming support in the twentieth century, American society and law re-imagined marriage as a relationship between individuals, each of whom should lead a flourishing life—and nowhere is this development more apparent than in the transformation of dozens of unitive rules governing the rights of the marital partners. For an important example, the rule barring wives from contracting or owning property without the consent of their husbands gradually disappeared in the course of the twentieth century; the old default rule, with a stringent override, was replaced by a new default rule (wives could contract and own property in their own names) in most states by 1920.¹⁰⁵ Similarly, most of the mandatory rules were softened into default rules, and overrides for hard default rules were relaxed between 1911 and 2011. Finally, many current unitive rules are in the form of

104. See, e.g., GEORGE E. HARRIS, A TREATISE ON THE LAW OF CONTRACTS BY MARRIED WOMEN §§ 117, 321, 325, 414 (1887); 3 WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS § 1667 (2d ed. 1920); JAMES SCHOULER & ARTHUR W. BLAKEMORE, A TREATISE ON THE LAW OF DOMESTIC RELATIONS § 229, at 245 (6th ed. 1921) (explaining that in some states and cases, the “husband’s consent is required . . . to validate the wife’s contract”).

105. Cf. CHESTER G. VERNIER & JOHN B. HURLBUT, 3 AMERICAN FAMILY LAWS: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII (TO JAN. 1, 1935) § 152, at 34–47 (1935) (noting that as late as 1934, a few jurisdictions prevented a wife from entering into certain contracts without her husband’s consent). For state-by-state examination of women’s property and contract laws, see the tables and maps in Rick Geddes & Dean Lueck, *The Gains from Self-Ownership and the Expansion of Women’s Rights*, 92 AM. ECON. REV. 1079 (2002), and R. Richard Geddes, Dean Lueck & Sharon Tennyson, *Human Capital Accumulation and the Expansion of Women’s Economic Rights* (Apr. 24, 2009) (unpublished manuscript), available at http://cardon.web.arizona.edu/files/Geddes_Lueck_Tennyson0409.pdf.

state-supplied benefits rather than state-imposed duties or burdens upon romantic couples.

a. Unitive Marriage and Public Law. Most states in the early twentieth century enforced marital unity by absolute bars to spouses testifying against one another in public legal proceedings, but spouses could testify in support of one another, both rules consistent with the natural law justification for unitive rules.¹⁰⁶ After World War II, most states and the U.S. Supreme Court replaced the mandatory rule against hostile spousal testimony with a default rule with a tough override: spouses could testify against one another only with the consent of both spouses,¹⁰⁷ a hard requirement to meet when one spouse would be harmed by the testimony. Even in this period, some states replaced the old mandatory rule with a default rule having an easier override, namely, the consent of the testifying spouse.¹⁰⁸ In the next generation, more than half the states adopted the new rule, and the U.S. Supreme Court followed the state consensus in 1980.¹⁰⁹ Interestingly, eight states in 1980 still followed the old mandatory rule, and another sixteen still followed the tough override rule.¹¹⁰ As this example illustrates, the movement from mandatory rules to default-with-override rules has typically been messy and uneven, given the different politics and governance regimes in the fifty states.

Also messy and uneven was the twentieth-century movement in the states to abolish mandatory rules barring one spouse from suing another. Once state legislatures had repealed their laws preventing wives from owning property and contracting in their own names, state judges were pressed to allow wives to sue their own husbands for tort as well as contract and property law claims, a prospect that was anathema to the natural law view of marriage as creating an indissoluble unity. In *Brown v. Brown*,¹¹¹ the Connecticut Supreme Court overruled the common law immunity of spouses for utilitarian reasons.¹¹² Although this decision was handed down in 1914, the process by which courts have abrogated common law tort immunities has varied from state to state, with

106. See *Funk v. United States*, 290 U.S. 371, 381 (1933) (surveying state legislative and judicial practice).

107. See *Hawkins v. United States*, 358 U.S. 74, 77–78 (1958) (surveying state and federal practice circa 1958).

108. See *id.* at 81–82 & n.3 (Stewart, J., concurring).

109. See *Trammel v. United States*, 445 U.S. 40, 48–50 (1980) (providing detailed examination of the evolution of state law from 1958 to 1980).

110. See *id.* at 48–50 n.9 (providing fifty-state survey).

111. 89 A. 889 (Conn. 1914). On the critical role of the married women's property statutes in decisions like *Brown*, see Carl Tobias, *The Imminent Demise of Interspousal Tort Liability*, 60 MONT. L. REV. 101, 102 (1999); Kathryn Walker Lyles, Note, *Suit Your Spouse: Tort and Third Party Liability Arising from Divorce Actions*, 30 AM. J. TRIAL ADVOC. 609, 609 (2007); Daniel M. Oyler, Note, *Interspousal Tort Liability for Infliction of a Sexually Transmitted Disease*, 29 J. FAM. L. 519, 523–24 (1990/1991).

112. *Brown*, 89 A. at 892.

most states not acting until after World War II.¹¹³ The result has been the elimination of a mandatory rule central to the old natural law understanding of family law, and its replacement with a default rule easily overridden by aggrieved spouses.

Not all of the legal changes in the twentieth century eased previously entrenched mandatory rules. Indeed, some legal changes created new mandatory rules based upon the more aggressively regulatory policies of the modern administrative state. For example, public officials are prohibited from using their offices to make governmental decisions from which they *or their spouses* benefit, and they *and their spouses* are likewise barred from receiving gifts.¹¹⁴ Increasingly numerous and detailed, these are mandatory rules reflecting the unitive nature presumed for married couples, and they have expanded as the modern regulatory state has expanded. Most of these conflict-of-interest rules do not apply to cohabiting or domestic partners.¹¹⁵

b. Sexual Relations and Unitive Marriage. The natural law understanding of marriage as a legal unity had its deepest expression in the rules of sexual conduct: procreative sexuality outside of marriage was legally forbidden, but inside marriage any such sexual interaction, including that involving force or

113. See generally Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 421–35 (1989) (discussing the varying treatment of interspousal tort immunity in the United States between 1914 and 1970). For leading state statutes and court decisions, see HAW. REV. STAT. § 572-28 (2006); 750 ILL. COMP. STAT. 65/1 (2010); N.H. REV. STAT. ANN. § 460:2 (2011); R.I. GEN. LAWS § 15-4-17 (2011); VA. CODE ANN. § 8.01-220.1 (2011); Penton v. Penton, 135 So. 481, 483 (Ala. 1931); Cramer v. Cramer, 379 P.2d 95, 97 (Alaska 1963); Fernandez v. Romo, 646 P.2d 878, 883 (Ariz. 1982); Leach v. Leach, 300 S.W.2d 15, 17 (Ark. 1957); Self v. Self, 376 P.2d 65, 66 (Cal. 1962); Rains v. Rains, 46 P.2d 740, 742 (Colo. 1935); Bushnell v. Bushnell, 131 A. 432, 433 (Conn. 1925); Beattie v. Beattie, 630 A.2d 1096, 1101 (Del. 1993); Rogers v. Yellowstone Park Co., 539 P.2d 566, 571 (Idaho 1974); Brooks v. Robinson, 284 N.E.2d 794, 798 (Ind. 1972); Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979); Flag v. Loy, 734 P.2d 1183, 1190 (Kan. 1987); Brown v. Gosser, 262 S.W.2d 480, 484 (Ky. 1953); Henriksen v. Cameron, 622 A.2d 1135, 1141 (Me. 1993); Bozman v. Bozman, 830 A.2d 450, 471 (Md. 2003); Hosko v. Hosko, 187 N.W.2d 236, 238 (Mich. 1971) (per curiam); Beaudette v. Frana, 173 N.W.2d 416, 420 (Minn. 1969); Burns v. Burns, 518 So. 2d 1205, 1211 (Miss. 1988); Townsend v. Townsend, 708 S.W.2d 646, 650 (Mo. 1986); Noone v. Fink, 271 P.2d 1275, 1276 (Mont. 1986); Imig v. March, 279 N.W.2d 382, 386 (Neb. 1979); Merenoff v. Merenoff, 388 A.2d 951, 962 (N.J. 1978); Maestas v. Overton, 531 P.2d 947, 948 (N.M. 1975); State Farm Mut. Auto. Ins. Co. v. Westlake, 324 N.E.2d 137, 139 (N.Y. 1974); Crowell v. Crowell, 105 S.E. 206, 211 (N.C. 1920); Shearer v. Shearer, 480 N.E.2d 388, 393 (Ohio 1985); Courtney v. Courtney, 87 P.2d 660, 661–62 (Okla. 1938); Heino v. Harper, 759 P.2d 253, 255 (Or. 1988); Hack v. Hack, 433 A.2d 859, 861 (Pa. 1981); Boone v. Boone, 546 S.E.2d 191, 194 (S.C. 2001); Scotvold v. Scotvold, 298 N.W. 266, 272 (S.D. 1941); Davis v. Davis, 657 S.W.2d 753, 759 (Tenn. 1983); Tywman v. Tywman, 855 S.W.2d 619, 624 (Tex. 1993); Ellis v. Estate of Ellis, 169 P.3d 441, 443 (Utah 2007); Freehe v. Freehe, 500 P.2d 771, 777 (Wash. 1972), *overruled on other grounds* by Brown v. Brown, 675 P.2d 1207 (Wash. 1984); Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 344 (W. Va. 1978); Tader v. Tader, 737 P.2d 1065, 1065 (Wyo. 1987).

114. See Letter from Barry Bedrick, Assoc. Gen. Counsel, Gen. Accounting Office, to Representative Henry J. Hyde, Chairman, House Comm. on the Judiciary 8–9, 42–44 (Jan. 31, 1997), *available at* <http://www.gao.gov/archive/1997/og97016.pdf> (explaining and listing the many federal conflict-of-interest rules that apply to officials' spouses as well as the officials themselves).

115. See *id.* (implying that the GAO list of federal conflict-of-interest rules is applicable only to "spouses" and not domestic partners or similar relationships).

coercion, was allowed. In the last hundred years, the utilitarian understanding has opened up more sexual opportunities for unmarried couples, while narrowing the sexual liberties permitted under the umbrella of marriage.

In 1911, spouses were barred by law from engaging in penile-vaginal sexual relations outside of marriage, a norm that was enforced by mandatory rules criminalizing adultery¹¹⁶ and by default rules imposing divorce penalties on cheating spouses.¹¹⁷ Such laws were vigorously enforced early in the century, but enforcement fell off dramatically in the period surrounding World War II.¹¹⁸ In the last half century, it has been a rare occurrence for enforcement to occur without a spousal complaint—meaning that, in practice, the adultery bar was an increasingly soft mandatory rule that, in effect, operated as a default rule. Nonetheless, forty-four states and the District of Columbia retained criminal adultery laws around 1961.¹¹⁹

116. Almost all states in 1911 criminalized adultery. Compare 11 CHARLES E. CHADMAN, CHADMAN'S CYCLOPEDIA OF LAW: CRIMINAL LAW CRIMINAL PROCEDURE AND EVIDENCE 108 (1912) ("Adultery is voluntary sexual connection between persons of opposite sexes, one of whom is married. It is punished as an offence in every State in the Union."), and JOHN G. HAWLEY & MALCOLM MCGREGOR, THE CRIMINAL LAW 277 (4th ed. 1903) ("Adultery . . . is now made [criminally] punishable by statute in all of the states."), with JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 654a (rev. by Marion C. Early, 3d ed. 1901) ("In a considerable number of our states, not all, a single act of adultery is made by statute indictable.").

117. See, e.g., 1 JOEL PRENTISS BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION AS TO THE LAW, EVIDENCE, PLEADING, PRACTICE, FORMS AND THE EVIDENCE OF MARRIAGE IN ALL ISSUES ON A NEW SYSTEM OF LEGAL EXPOSITION § 1501 (1891); FRANK H. KEEZER, A TREATISE ON THE LAW OF MARRIAGE AND DIVORCE: WITH SYNOPSIS OF THE MARRIAGE AND DIVORCE STATUTES OF ALL STATES AND CONTAINING COMPLETE FORMS FOR ALL PURPOSES §§ 805–18, 820–43, 845, 848–59 (2d ed. 1923); see also Chamallas, *supra* note 38, at 785 ("For married persons, the chief legal deterrent to adultery was a fault-based divorce system that threatened the adulterous spouse either with loss of financial support or punitively high support obligations. A wife's adultery was also likely to be punished by the denial of custody of the children upon divorce." (footnotes omitted)).

118. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 346 (1993) (stating that adultery enforcement was on its "last legs" in the 1970s and 1980s).

119. ALA. CODE tit. 14, § 16 (Michie Co. 1958); ALASKA COMP. LAWS § 65-9-3 (Bancroft-Whitney Co. 1949) (prohibiting cohabitation in open state of adultery); ARIZ. REV. STAT. ANN. § 13-221 (West 1956); CAL. PENAL CODE ANN. §§ 269a–b (West 1957); COLO. REV. STAT. § 40-9-3 (Callaghan & Co. 1953); CONN. GEN. STAT. ANN. § 53-218 (West 1958); DEL. CODE ANN. tit. 11, § 311 (West 1953); D.C. CODE ANN. § 22-301 (1961); FLA. STAT. ANN. § 798.01 (Harrison Co. 1976); GA. CODE ANN. § 26-5801 (Harrison Co. 1953); HAW. REV. LAWS § 309-9 (Filmer Bros. Press 1955); IDAHO CODE ANN. § 18-6601 (Bobbs-Merrill Co. 1979); 38 ILL. REV. STAT. 46/11 (Burdette Smith Co. 1957); IND. CODE ANN. § 10-4207 (Bobbs-Merrill Co. 1956); IOWA CODE ANN. § 702.1 (West 1950); KAN. GEN. STAT. ANN. § 21-908 (1949); KY. REV. STAT. § 436.070 (1948); ME. REV. STAT. ANN. ch. 134, § 1 (Michie Co. 1954); MD. ANN. CODE art. 27, § 4 (Michie Co. 1957); MASS. ANN. LAWS ch. 272, § 14 (Michie Co. 1968); MICH. STAT. ANN. § 28.219 (Callaghan & Co. 1962); MINN. STAT. § 617.15 (1961); MISS. CODE ANN. ch. 1, § 1998 (Harrison Co. 1956); MO. ANN. STAT. § 563.150 (Vernon Law Book Co. 1953); NEB. REV. STAT. § 28-902 (1948); N.H. REV. STAT. ANN. § 579:1 (1955); N.J. STAT. ANN. § 2A:88-1 (West 1953); NEW YORK PENAL LAW OF 1909 §§ 100–102 (appearing in N.Y. PENAL LAW App. (West 1967)) (containing "complete text of such law as it existed immediately prior to September 1, 1967"); N.C. GEN. STAT. § 14-184 (Michie Co. 1953) (text referring to fornication but title referring to adultery); N.D. CENT. CODE § 12-22-11 (Allen Smith Co. 1960); OHIO REV. CODE ANN. § 2905.08 (W.H. Anderson Co. 1954); OKLA. STAT. ANN. tit. 21, § 872 (West 1958); OR. COMP. LAWS ANN. § 23-901 (Bancroft-Whitney Co. 1940 & Supps. 1943, 1944–1947); 18 PENN. STAT. ANN. 18, § 4505 (West 1963); R.I. GEN. LAWS

In the last half century, from 1961 to 2011, half the states have repealed their criminal adultery laws,¹²⁰ of the twenty-two laws still in effect, almost all of them penalize adultery as a misdemeanor.¹²¹ Enforcement, even at the behest of a complaining spouse, has been quite rare—but adultery remains a ground for divorce in most states and may have bearing on child-custody decisions in some states. Although most Americans disapprove of adulterous conduct, the moral disapproval is only weakly enforced, primarily through default rules and not by mandatory rules.

Every state in 1911 had a rule barring the state from prosecuting husbands from raping their wives.¹²² This marital-rape exemption was grounded in the common law/natural law understanding of marriage as creating a unity for purposes of procreation. Although feminists objected to this exemption in the nineteenth century, American family law refused to abrogate the exemption, and it strongly shaped the expectations of wives who felt they had no choice but to submit to the sexual advances of their husbands.¹²³ Even though American family law moved away from the common law/natural law unitive ideal over the course of the twentieth century, the marital-rape exemption persevered in most states until well after World War II.¹²⁴ Today, almost all states have either abolished or significantly narrowed the exemption and the allowances; most

§ 11-6-2 (Bobbs-Merrill Co. 1956); S.C. CODE § 16-406 (1952); S.D. CODE § 13-3002 (1939 & Supp. 1960); TEX. PENAL CODE art. 502 (Vernon Law Book Co. 1952); UTAH CODE ANN. § 76-53-3 (Allen Smith Co. 1953); VT. STAT. ANN. tit. 13, § 201 (Equity Pub. Corp. 1958); VA. CODE ANN. § 18.1-190 (Michie Co. 1950, rev. 1960); WASH. REV. CODE ANN. § 9.79.110 (Bancroft-Whitney Co. & West 1961); W. VA. CODE § 61-8-3 (Michie Co. 1955); WEST'S WIS. STAT. ANN. § 944.16 (West 1958).

120. See Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 226 & n.233 (1986) ("In 1955, the American Law Institute recommended in its Model Penal Code that adultery be decriminalized, and many states have followed that recommendation." (internal footnotes omitted)) (citing MODEL PENAL CODE § 207.1, cmts. at 204–10 (Tent. Draft No. 4, 1955), and enumerating a list of states that have abolished adultery laws).

121. ALA. CODE § 13A-13-2 (2011); ARIZ. REV. STAT. ANN. § 13-1408 (2011); COLO. REV. STAT. § 18-6-501 (2008); FLA. STAT. ANN. § 798.01 (West 2007); GA. CODE ANN. § 16-6-19 (2011); IDAHO CODE ANN. § 18-6601 (2004); 720 ILL. COMP. STAT. 5/11–35 (West 2011); MD. CODE ANN., CRIM. LAW § 10-501 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2000); MICH. COMP. LAWS ANN. § 750.30 (2004) (punishing as a felony); MINN. STAT. ANN. § 609.36 (2010); MISS. CODE ANN. § 97-29-1 (2006); N.H. REV. STAT. ANN. § 645:3 (West 2011); N.Y. PENAL LAW § 255.17 (McKinney 2011); N.C. GEN. STAT. § 14-184 (West 2011) (text referring solely to fornication); N.D. CENT. CODE § 12.1-20-09 (2011); OKLA. STAT. ANN. tit. 21, § 871 (West 2011); R.I. GEN. LAWS § 11-6-2 (West 2011); S.C. CODE ANN. § 16-15-60 (2011); UTAH CODE ANN. § 76-7-103 (West 2011); VA. CODE ANN. § 18.2-365 (West 2011); WIS. STAT. ANN. § 944.16 (West 2011).

122. See THOMAS WELBURN HUGHES, A TREATISE ON CRIMINAL LAW AND PROCEDURE 288 (1919); WM. L. CLARK, WM. L. MARSHALL & HERSCHEL BOUTON LAZELL, A TREATISE ON THE LAW OF CRIMES 422 (2d ed. 1905); Annotation, *Criminal Responsibility of Husband as for Rape, or Assault To Commit Rape, on Wife*, 18 A.L.R. 1063, 1063 (1922). See generally Hasday, *supra* note 40, at 1392–1406 (providing detailed exegesis of the common law and early American exemption of spousal rape from sexual-assault laws).

123. See Hasday, *supra* note 40, at 1407–13 (discussing KATHARINE BEMENT DAVIS, FACTORS IN THE SEX LIFE OF TWENTY-TWO HUNDRED WOMEN (1929)).

124. See Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 L. & SOC. INQUIRY 941, 945–49 (1995) (examining in detail the decline and evolution of marital rape exemptions).

states treat marital rape substantially the same as rape outside of marriage.¹²⁵ Of course, for rape generally, the default rule is no criminal liability, and the override rules entailed in criminal prosecutions create high hurdles for successful prosecution (such as the proof-beyond-a-reasonable-doubt standard).

c. Marital Children. The point of marriage, according to the natural law understanding, is marital procreation. Combined with the rule against extramarital sexual activities, this precept supported the traditional mandatory rule that any child born within a marriage was conclusively presumed to be the biological child of the husband and the wife.¹²⁶ As cohabitation became legal and state penalties or discriminations imposed upon nonmarital children weakened, legislatures and judges grew more open to the utilitarian perspective, which focuses on the flourishing of the child and implements the marital-children idea through default rather than mandatory rules.¹²⁷

In its earliest code, for example, California adopted the common law mandatory rule,¹²⁸ which persisted on the statute books through most of the twentieth century with little alteration.¹²⁹ In 1980, California's legislature changed the statute, transforming it from a mandatory rule to a default rule that could be rebutted by a blood test at the behest of the putative father or another interested person.¹³⁰ The override rule, however, was a stringent one, requiring the putative father (and others) to introduce the blood test within two years of the birth of the child, thereby rendering the presumption conclusive after that period expires.¹³¹ More than two-thirds of the states allow putative fathers (and others) to rebut the marital-parentage presumption, but usually the override rule is stringent, for example requiring the challenger to make his case by clear and convincing evidence rather than the normal civil standard of by a preponderance of the evidence.¹³²

Additionally, most states have created an additional barrier making it even harder to rebut the marital presumption. These states have enacted statutes establishing putative-father registries and requiring fathers not married to the

125. See Jennifer McMahon-Howard, *Criminalizing Spousal Rape: The Diffusion of Legal Reform*, 52 SOC. PERSP. 505, 513 tbl.1 (2009) (summarizing spousal-rape reform in the states through 2009).

126. *E.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 117 (1988) (tracing California's conclusive presumption in 1872 through loosening the presumption in 1975 and afterwards).

127. See Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 326–31 (2005).

128. CAL. CIV. PROC. CODE § 1962(5) (1872) (presuming "indisputably" that children born within a marriage are the progeny of wife and husband, unless the latter is impotent).

129. 1965 Cal. Stat. ch. 299, § 2 (revised codification, replacing "indisputably" with "conclusively").

130. 1980 Cal. Stat. ch. 1380; see also 1981 Cal. Stat. ch. 1180 (providing that the mother/wife could introduce blood-test evidence to rebut the presumption).

131. It was this version of the law that the Supreme Court upheld in *Michael H.*, 491 U.S. at 117. The current version, substantially similar to the 1980 statute, is codified at CAL. FAM. CODE §§ 7540–7541 (2011).

132. *E.g.*, *Weidenbacher v. Duclos*, 661 A.2d 988, 1001 (Conn. 1995). See generally Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 373–75 (1988).

mothers of their children to register with the state as a prerequisite to the exercise of parental rights.¹³³ The laws requiring putative fathers to register have much broader effect, of course, because they operate to bar parental rights even when the mother is not married to another man when the child is born. Such laws are most frequently litigated, however, when the putative father and the mother are not married when the child is born but the mother subsequently marries another man who desires to adopt the child.¹³⁴

Consider another, less dramatic, evolution. Under the common law, the parent-child relationship could not be dissolved; the mandatory rule was that a parent owed responsibilities to her or his legal child for life.¹³⁵ In the nineteenth and twentieth centuries, all states enacted adoption statutes allowing parents voluntarily to give up their rights and responsibilities to the couple or individual wishing to adopt a child.¹³⁶ In the twentieth century, the states created processes by which parents could seek termination of their own parental responsibilities, and minors could seek emancipation before reaching the usual age of adult status.¹³⁷ The default rule remains the same as it has always been: the legal parent owes a continuing duty of support and nurture to the child, but that default can now be overridden, though the requirements for override are quite stringent.

3. Antenuptial Agreements

State courts traditionally enforced premarriage (antenuptial) agreements between spouses to divide property and assets in the event of the death of either

133. See Dale Joseph Gilsinger, Annotation, *Requirements and Effects of Putative Father Registries*, 28 A.L.R.6th 349 (2007) (West, Westlaw updated with current cases weekly). Some state courts have applied these statutes leniently, to avoid unnecessary waiver of parental rights by unmarried fathers. E.g., *J.S.A. v. M.H.*, 863 N.E.2d 236, 252 (Ill. 2007).

134. See, e.g., *In re Adoption of Snaveley*, No. 2000 CA 20, 2000 WL 1597977, at *1 (Ohio Ct. App. 2000). See generally Gilsinger, *supra* note 133 (collecting cases, many of which follow the scenario described in the text accompanying this footnote).

135. See, e.g., John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 335 (1922) (explaining that the common law did not recognize adoption because parents could not abdicate their responsibilities by contract); see also 4 CHESTER G. VERNIER & E. PERRY CHURCHILL, *AMERICAN FAMILY LAWS: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII* § 254 (1936) (explaining that there is “no sanction, at common law, for . . . adoption”); Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745–48 (1956) (discussing the common law’s lack of recognition for adoption).

136. Before 1911, most states permitted adoption. See WALTER C. TIFFANY & ROGER W. COOLEY, *HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS* 243 (2d ed. 1909); JOSEPH R. LONG, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS* 307 (1905). By 1925, every American jurisdiction authorized adoption. See EMELYN FOSTER PECK, U.S. DEP’T OF LABOR, *ADOPTION LAWS IN THE UNITED STATES: A SUMMARY OF THE DEVELOPMENT OF ADOPTION LEGISLATION AND SIGNIFICANT FEATURES OF ADOPTION STATUTES, WITH THE TEXT OF SELECTED LAWS* 1 (1925). On the history and evolution of adoption laws, see NAOMI R. CAHN & JOAN HEIFETZ HOLLINGER, *FAMILY BY LAW: AN ADOPTION READER* (2004); E. WAYNE CARR, *ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES* (2002).

137. See ANNE L. ALSTOTT, *NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS* 46 (2004); Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239 (1991).

spouse but did not enforce such spousal agreements dividing assets and determining or waiving support obligations in the event of a divorce.¹³⁸ The reluctance to enforce antenuptial agreements contemplating divorce was mainly justified by the natural law understanding of romantic relationships: because marriage is for life, the spouses ought not to “plan” for divorce. Thus, judges expressed fears that such agreements would undermine “[t]he state’s interest in the preservation of the marriage”¹³⁹ and would threaten the very integrity of the institution of marriage.¹⁴⁰

Since 1970, the states have modified that mandatory rule to respond to the historically high divorce rate in the post-1961 United States.¹⁴¹ Either by legislation or by court decision, all the states in the union and the District of Columbia have replaced a mandatory rule (statutory division of assets upon dissolution of civil marriage) with a default rule that the spouses can override by contract, including antenuptial agreements.¹⁴² Most states, however, have not treated antenuptial agreements the same as commercial contracts, and many

138. *E.g.*, *French v. McNarney*, 195 N.E. 714, 715 (Mass. 1935); *Crouch v. Crouch*, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964), *overruled by* *Cary v. Cary*, 937 S.W.2d 777, 781–82 (Tenn. 1996); *Fricke v. Fricke*, 42 N.W.2d 500, 502 (Wis. 1950); *cf.* *Posner v. Posner*, 233 So. 2d 381, 383–85 (Fla. 1970) (describing and then rejecting the traditional approach to antenuptial agreements); *Ware v. Ware*, 687 S.E.2d 382, 390–91 (W. Va. 2009) (similar).

139. *Posner*, 233 So. 2d at 383.

140. *French*, 195 N.E. at 716 (“The public interest in the integrity of marriage requires that its underlying rights and obligations be not subject to variation by agreement of the parties such as here shown.”).

141. *Developments in the Law—The Law of Marriage and Family*, *supra* note 35, at 2078–82.

142. For the statutes and cases authorizing the enforcement of antenuptial agreements concerning separation or divorce in each state, see DEL. CODE ANN. tit. 13, § 323 (2011); IDAHO CODE ANN. § 32-933 (2006); ME. REV. STAT. ANN. tit. 19-A, § 604 (1998); MONT. CODE ANN. § 40-2-605 (2011); N.M. STAT. ANN. § 40-3A-4 (2011); N.C. GEN. STAT. § 52B-4 (2011); N.D. CENT. CODE § 14.03.1-03 (2011); R.I. GEN. LAWS § 15-17-3 (2011); S.D. CODIFIED LAWS § 25-2-18 (2011); TENN. CODE ANN. § 36-3-501 (2012); TEX. FAM. CODE ANN. § 4.003 (2011); UTAH CODE ANN. § 30-8-4 (2011); VA. CODE ANN. § 20-150 (2011); *Reynolds v. Reynolds*, 376 So. 2d 732 (Ala. Civ. App. 1979); *Brooks v. Brooks*, 733 P.2d 1044, 1048–49 (Alaska 1987); *Williams v. Williams*, 801 P.2d 495 (Ariz. Ct. App. 1990); *Dingledine v. Dingledine*, 523 S.W.2d 189 (Ark. 1975); *In re Marriage of Dawley*, 551 P.2d 323, 325 (Cal. 1976); *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); *Parniawski v. Parniawski*, 359 A.2d 719 (Conn. Super. Ct. 1976); *Burtoff v. Burtoff*, 418 A.2d 1085, 1089 (D.C. 1980); *Posner v. Posner*, 233 So. 2d 381, 386 (Fla. 1970); *Scherer v. Scherer*, 292 S.E.2d 662, 666 (Ga. 1982); *Rossiter v. Rossiter*, 666 P.2d 617 (Haw. 1983); *Volid v. Volid*, 286 N.E.2d 42 (Ill. 1972); *In re Marriage of Boren*, 475 N.E.2d 690 (Ind. 1985); *In re Marriage of Sell*, 451 N.W.2d 28 (Iowa Ct. App. 1989); *Matlock v. Matlock*, 576 P.2d 629 (Kan. 1978); *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990); *Holiday v. Holiday*, 358 So. 2d 618 (La. 1978); *Skelton v. Skelton*, 490 A.2d 1204 (Me. 1985); *Frey v. Frey*, 471 A.2d 705 (Md. 1984); *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981); *Rinvelt v. Rinvelt*, 475 N.W.2d 478 (Mich. Ct. App. 1991); *Rudbeck v. Rudbeck*, 365 N.W.2d 330 (Minn. Ct. App. 1985); *Long v. Long*, 928 So. 2d 1001 (Miss. 2006); *Ferry v. Ferry*, 586 S.W.2d 782, 787–88 (Mo. Ct. App. 1979); *Buettner v. Buettner*, 505 P.2d 600 (Nev. 1973); *MacFarlane v. Rich*, 567 A.2d 585 (N.H. 1989); *Marschall v. Marschall*, 477 A.2d 833, 838–40 (N.J. Super. Ct. Ch. Div. 1984); *Propp v. Propp*, 493 N.Y.S.2d 147 (N.Y. App. Div. 1985); *Hook v. Hook*, 431 N.E.2d 667 (Ohio 1982); *Freeman v. Freeman*, 565 P.2d 365 (Okla. 1977); *Unander v. Unander*, 506 P.2d 719 (Or. 1973); *McGannon v. McGannon*, 359 A.2d 431 (Pa. Super. Ct. 1976); *Hardee v. Hardee*, 558 S.E.2d 264 (S.C. Ct. App. 2001); *Bassler v. Bassler*, 593 A.2d 82 (Vt. 1991); *Padova v. Padova*, 183 A.2d 227 (Vt. 1962); *In re Marriage of Hadley*, 565 P.2d 790 (Wash. 1977); *Gant v. Gant*, 329 S.E.2d 106, 114–16 (W. Va. 1985); *Button v. Button*, 388

state judges will not enforce such agreements unless they are satisfied that both spouses entered into the agreement voluntarily *and* that the antenuptial agreement is substantively fair and reasonable.¹⁴³

The Uniform Premarital Agreement Act (UPAA), propounded by the American Law Institute in 1983 and adopted by twenty-six states by the turn of the millennium,¹⁴⁴ is a model statute for implementation of the new regime, grounded in the utilitarian rather than natural law perspective. Section 6 of the UPAA provides that antenuptial agreements are to be enforced by state courts *unless* the agreement was not entered voluntarily *or* the terms of the agreement are unconscionable and the complaining spouse was denied full and fair disclosure by the other spouse.¹⁴⁵

The UPAA represents a moderate compromise between the old mandatory rule and the default-with-easy-override regime adopted in some states during the 1970s. As implemented by judges in adopting states, though, the UPAA's enforcement rule looks a lot like the evolving common law standards judges were following before the UPAA. Thus, judges in UPAA jurisdictions are most likely to enforce antenuptial agreements when one spouse has signed the agreement with full disclosure from the other spouse and an opportunity to consider the terms of the agreement without being rushed into signing.¹⁴⁶

In another regulatory proposal, the American Law Institute has propounded Principles for Family Dissolution (*Principles*) that follow the rough consensus that antenuptial agreements should usually be enforceable, *unless* they were not entered into voluntarily *or* were unconscionable at the time they were signed by the prospective spouses.¹⁴⁷ In addition to these requirements, which track evolving state law, the *Principles* would place the burden of proof on the spouse relying on the antenuptial agreement to terminate spousal support and other fundamental marriage rights *and* would stipulate that the reviewing court should be reluctant to enforce an antenuptial agreement that a court would consider involuntary.¹⁴⁸

In the last century, the terms of asset division and support obligations (alimony) between the spouses have evolved from a regime of mandatory rules

N.W.2d 546 (Wis. 1986); *Lund v. Lund*, 849 P.2d 731 (Wyo. 1993), *abrogated on other grounds by* *Vaughn v. State*, 962 P.2d 149 (Wyo. 1998).

143. See Judith T. Younger, *Antenuptial Agreements*, 28 WM. MITCHELL L. REV. 697, 700-02 (2001) (discussing in detail recent judicial decisions examining antenuptial agreements for both procedural and substantive fairness). For example, many states will not allow antenuptial agreements to waive child support, and some states do not permit waiver of spousal support unless the parties have followed rigorous override procedures. *E.g.*, CAL. FAM. CODE § 1612(c); IOWA CODE § 596.5(g)(2).

144. Younger, *supra* note 143, at 716-17 (describing the Uniform Law and its legislative adoption).

145. UNIF. PREMARITAL AGREEMENT ACT § 6 (1983).

146. *E.g.*, *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 267-68 (Minn. 1989) (mixing common law and UPAA review of antenuptial agreement and remanding for further substantive review by the trial court).

147. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.01 cmt. d (2000).

148. *Id.* § 7.05(3).

to a regime of default rules with increasingly complicated and diverse override rules. Indeed, the primary debate in the last generation has been over the stringency of override rules. Contrast the UPAA and the *Principles*. The latter follows the traditional default rule, namely, the statutory support obligations and division of property upon divorce and requires the spouse invoking a prenuptial agreement to demonstrate that the agreement is voluntary and fair. The former creates a new default rule, namely, the agreement between the spouses, and requires the spouse objecting to the agreement to demonstrate that it is not voluntary and fair.

As we shall now see, the debate over antenuptial agreements finds both parallels and differences in the important debate over no-fault divorce.

B. NO-FAULT DIVORCE: MARRIAGE FOR LIFE, WITH INCREASINGLY
LENIENT OVERRIDE RULES

A second big development in American family law in the last century has been making it easier for spouses to end their marriage through divorce. The liberalization of divorce law has roughly paralleled the liberalization of marital rules—and both phenomena reflect the increasing influence of the utilitarian understanding of family in American culture and law. The ability to obtain an easy divorce is inconsistent with the natural law understanding of family, especially as refracted through American religion.¹⁴⁹ But once our public culture reached a consensus that marriage and family are best justified by utilitarian and social advantages, the case for easier divorce became compelling. As before, the happiness and sociability values of family supported state regulation of divorce through default rules with relatively easy overrides, rather than through the traditional rule banning divorce except for adultery and other kinds of fault.

In 1911, American states allowed divorce, but a large majority did so only when one spouse's dishonorable conduct essentially voided the marriage contract.¹⁵⁰ Every state except South Carolina allowed spouses to divorce because of adultery,¹⁵¹ and most states also granted divorces for extreme cruelty, deser-

149. As a matter of ecclesiastical practice, the Roman Catholic Church's natural law theology has long considered divorce inconsistent with procreative God-given marriage; thus, many devout Catholics have sought an annulment from the Church, a proceeding that may be influenced by the grounds by which the spouses secure their civil divorce. See *CATHOLIC DIVORCE: THE DECEPTION OF ANNULMENTS* 9–20, 138–49 (Pierre Hegy & Joseph Martos eds., 2000) (discussing both historical and modern Catholic doctrine in detail). Although fundamentalist Protestant denominations have allowed divorce, they are attentive to Christ's admonition that one may not remarry unless abandoned by an unfaithful spouse. See *Matthew* 19:9.

150. See S.B. KITCHIN, *A HISTORY OF DIVORCE* 215 (1912) (positing that states generally required "some unlawful or disgraceful act on the part of one of the spouses entitling the other to dissolve the marriage"); 2 *FREDERIC J. STIMSON, AMERICAN STATUTE LAW* § 6201 (1886) (detailing the "causes" that could justify divorce); Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 *FAM. REL.* 317 (2002) (examining the move to no-fault-based grounds for divorce).

151. See BISHOP, *supra* note 117, § 1501.

tion, conviction or imprisonment for a serious crime, habitual intoxication, and nonsupport.¹⁵² Fault-based divorce was an expression of the natural law understanding of marriage as a relationship steeped in morality; only when the moral basis for marriage was destroyed should divorce be granted, and a major goal of divorce law was to punish the guilty spouse.¹⁵³ Accordingly, fault-based divorce could limit the at-fault spouse's rights to remarriage, child custody, alimony, his or her real and personal property, inheritance, insurance rights, dower, and curtesy.¹⁵⁴ Fault-based divorce could also negatively affect the legitimacy of the couple's children.¹⁵⁵

One might understand this regime as one of mandatory rules, whereby the legal rule was marriage for life unless the marriage was destroyed at its roots by adultery or the other fault-based reasons. In my view, however, it makes more sense to conceptualize this regime as one where there was a hard default rule of marriage-for-life, with an override rule (such as proof of adultery) that was difficult to meet. Understood that way, the history of American divorce law in the last century has been a debate over what the override rule ought to be. Although the default rule has remained the same—marriage-for-life—overriding the default has become much easier in the last hundred years.

The forces driving the relaxed override rules have been utilitarian ones: once spouses find themselves in a marriage that is making them unhappy, they want to end the marriage, and the law has made it progressively easier for them to do so, contrary to the natural law attitude toward marriage.¹⁵⁶ A legal barometer for this increasingly utilitarian focus of divorce law was the phenomenon of "living-apart" laws, allowing spouses to divorce without a showing of fault if they had lived apart for a specified period of time. Four states had enacted living-apart laws by 1911, but they imposed long waiting periods (ten years for

152. See FRANK H. KEEZER, *THE LAW OF MARRIAGE AND DIVORCE: GIVING THE LAW IN ALL THE STATES AND TERRITORIES WITH APPROVED FORMS* 233–343 (1906); 2 CHESTER G. VERNIER & BENJAMIN C. DUNIWAY, *AMERICAN FAMILY LAWS: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII* 3–4 (1932).

153. See, e.g., VERNIER & DUNIWAY, *supra* note 152, at 216 (explaining that many of the statutes were "designed to penalize the guilty or to favor the innocent spouse"). See generally Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994) (defending fault-based divorce along utilitarian rather than natural law lines); Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 653–54 (1984) (explaining the moral basis for marriage and the morals-saturated rules of divorce).

154. See VERNIER & DUNIWAY, *supra* note 152, at 215–64 (presenting the array of penalties imposed upon the spouse at fault, including denial of alimony).

155. See *id.* at 185–91 (showing that in some states, parental fault-based divorce rendered the marital children legal "bastards").

156. See CHERLIN, *supra* note 19, at 32 (observing that Americans overwhelmingly support marriage-for-life as a default rule but also overwhelmingly favor divorce when the marriage sours for one partner, even when there are minor children still in the household). But see Brinig & Crafton, *supra* note 153 (arguing that social utility does not support no-fault divorce, because the ease of divorce undermines the worthy promises embedded in the marriage contract).

all but one).¹⁵⁷ Between 1911 and 1967, most states adopted laws allowing divorce after a period of living apart, and most of the states shortened the required period of separation to between one and three years.¹⁵⁸ In that same period, seven states added incompatibility as a “fault” justifying divorce.¹⁵⁹ Without directly challenging the natural law understanding of marriage as a lifetime commitment, the living-apart and incompatibility laws were bows to the utilitarian understanding of family that was sweeping the country in the middle part of the century.

Between 1870 and 1945, divorce rates increased, even though the legal regime of fault-based divorce did not change significantly in most states.¹⁶⁰ In 1910, there were 8.8 divorces for every 100 marriages, a ratio that doubled by 1930, dipped during the Great Depression, and rose to high levels by the end of World War II.¹⁶¹ During that period, most practitioners and judges believed that the override rule was increasingly more lenient in practice than it was in theory: many married couples were manufacturing fault in order to secure jurisdiction for a divorce whose terms were worked out in advance.¹⁶² Additionally, Nevada and a few other states offered easy divorce judgments for short-term residents that the courts of the marital domicile were required to respect.¹⁶³ Such “quickie divorces” were another mechanism whereby many couples were able to take advantage of easier override rules than the high-cost rules that dominated state statute books.

In the first half of the twentieth century, therefore, the states were reluctant to abandon the natural law notion that marriage is inherently a lifetime commitment—but they were also unwilling to deny their citizens the freedom to escape

157. The states were Kentucky, North Carolina, Rhode Island, and Wisconsin. See J. HERBIE DiFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 78–79 tbl.4 (1997) (summarizing state-by-state changes in divorce law).

158. See James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 946–47 (2000).

159. The states were Alaska, Delaware, Kansas, Nevada, New Mexico, and Oklahoma. See DiFONZO, *supra* note 157.

160. Even in the states with living-apart and incompatibility grounds for divorce, few couples took advantage of the new standard because courts still expected a showing that the spouse petitioning for divorce was blameless. See *id.* at 69, 76–77.

161. See Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 633 & n.2 (1956); Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces*, 21 J. ECON. PERSP., Sept. 2007, at 27, 29 fig.1.

162. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CINN. L. REV. 1, 28, 118 (1987); see also Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1504–05 (2000) (opining that most American divorces after 1870 were “collusive” divorces, where the spouses worked together to manufacture fault and thereby to terminate their marriages).

163. See Friedman, *supra* note 162, at 1504–07 (tracing the popularity of Nevada divorces after the state in 1931 reduced its residency requirement to six weeks); Thomas Reed Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930, 937–38 (1945) (describing the emergence of Nevada as a center for divorces for out-of-state couples); see also *Williams v. North Carolina*, 325 U.S. 226, 231 (1945) (ruling that states could relitigate the jurisdictional issue of whether the divorcing spouses were bona fide domiciliaries of Nevada); *Williams v. North Carolina*, 317 U.S. 287, 297 (1942) (requiring states to give full faith and credit to quickie divorces secured in Nevada).

marriages that had become terribly unhappy for one or both spouses. Theoretically, the states were bowing to the new utilitarian philosophy, although they kept those bows in a legal closet. The law made that possible, through the new override rules: consistent with the natural law aspiration for marriage still endorsed by most Americans, state law retained the default rule of marriage-for-life—but at the same time allowed unhappy couples to escape marriage through easier-to-meet override rules.¹⁶⁴

The sexual revolution of the 1960s jump-started a more dramatic statutory reform, one that was an even greater departure from the natural law ideal and more openly responsive to the utilitarian view of marriage. This was the no-fault divorce revolution. Between 1969 and 1985, every state adopted some kind of statutory regime allowing divorce without fault; most of these states followed the lead of either California's Divorce Reform Act of 1969 or of the Uniform Marriage and Divorce Act of 1970, as revised in 1973.¹⁶⁵ The core reform was to translate the utilitarian understanding of family into a no-fault basis for divorce, namely "irreconcilable differences" or "irretrievable breakdown of the marriage."¹⁶⁶ The core reform was carried out by making it easier for unhappy couples to override the default rule of marriage-for-life.

Many of the divorce-reform statutes also allowed "unilateral" divorce, namely, a formal divorce decree provided at the behest of only one spouse.¹⁶⁷ Unilateral no-fault divorce represents a highly liberal rule for overriding the marriage-for-life default, but it would be wrong to assume that the utilitarian understanding always favors the maximum amount of choice. Indeed, exponents of the utilitarian perspective have sharply criticized unilateral no-fault divorce regimes for making divorce too easy and for relaxing previous mandatory rules for alimony and even child support, with the result that dependent spouses and children have often been left destitute after divorce.¹⁶⁸

164. Recall that overrides of the marriage-for-life default became easier because the old override rules were evaded or applied leniently, because new override rules were easier to meet, and because court decisions required that divorces granted in easy-override states like Nevada were binding on harder-override states.

165. See Jonathan Gruber, *Is Making Divorce Easier Bad for Children? The Long-Run Implications of Unilateral Divorce*, 22 J. LAB. ECON. 799, 803 tbl.1 (2004); Kay, *supra* note 162, at 4–14 (providing a summary of the move towards no-fault statutory regimes), 51–55 (providing a state-by-state analysis).

166. See MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 383–85 (1972); see also Kay, *supra* note 162, at 44–51 (providing a detailed account of the reform by a law professor involved in the uniform law as well as the California act).

167. See Gruber, *supra* note 165, at 140 & tbl.1 (documenting the trend of unilateral divorce regulations).

168. See H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. R. 437, 443–44 (1986) (arguing that unilateral divorce harmed the economic interests of dependent wives whose consent had to be purchased in the prior regime); Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528 (1996) (documenting a significant decline in the postdivorce standard of living for wives and a more modest increase in the postdivorce standard of living for husbands); see also ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 260–62 (1992) (similar).

Interestingly, the popular conception that no-fault divorce has led to astronomical divorce rates is also inaccurate. It is true that divorce rates continued to escalate in the 1970s, reaching an all-time high for our country in 1981—but the number of divorces has fallen since then.¹⁶⁹ The declining divorce rate is mainly a consequence of a sharp increase in the age of marriage for college graduates in the last generation; Americans without college degrees marry at younger ages and experience higher divorce rates.¹⁷⁰

Most of the regulatory work in family law is now being accomplished neither by mandatory rules, which have sharply declined in importance, nor even by default rules, which have increased in importance, but instead by override rules and governmental incentives. Override rules fine-tune the default rule regimes: the harder it is to override, the more a default will operate like a mandatory rule; the easier it is to override, the more a default will conduce to a regime where the partners make their own choices, with some guidance from the state. Incentives provide a gentler, prochoice mechanism for the government to encourage what it considers “best practices,” without the openly coercive and inefficient features of the old regime dominated by mandatory rules.¹⁷¹

If our polity wants to encourage marriage, there are more effective means for doing so than the discredited mandatory rules of the old regime. For example, state incentives often work better than punitive rules: some couples get married and stay married at least in part because of governmental or employment-based rewards for married couples. State endorsement can also serve as a focal point for community support; as Margaret Brinig has demonstrated empirically,

169. ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009, at 4 (2011), available at <http://www.census.gov/prod/2011pubs/p70-125.pdf>.

170. See CAHN & CARBONE, *supra* note 7 (providing a class basis for explaining different divorce rate trends in red and blue states: later-marrying college graduates have driven lower divorce rates in blue states, while red states have more nongraduates who are marrying earlier and divorcing more often); see also Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607 (2004); June Carbone, *Unpacking Inequality and Class: Family, Gender and the Reconstruction of Class Barriers*, 45 NEW ENG. L. REV. 527 (2011). Compare Justin Wolfers, *Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results*, 96 AM. ECON. REV. 1802, 1802 (2006) (finding a short-term effect for no-fault divorce laws but no long-term effect on divorce rates), with Stéphane Mechoulan, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 167 (2006) (finding that initial divorce rate increases in “true” no-fault jurisdictions were reversed when the age of marriage increased in the last generation).

171. There is a historical parallel between the nation’s disastrous experience with Prohibition and its post-Prohibition policies. Prohibition, lasting from 1919 to 1933, was implemented by federal and state statutes and constitutional-amendment-based mandatory rules against alcohol manufacture, sale, and sometimes possession and consumption. See Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-first Century*, 33 SUFFOLK U. L. REV. 235, 237–39 (2000). After 1933, the country moved to gentle nudges as the best response to alcohol abuse—especially through high taxes on liquor and regulation through licensing requirements. Taxation has been a highly efficient means for discouraging excessive consumption; licensing has probably been less effective but not as costly as Prohibition was. See Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 MILBANK Q. 461, 462–66, 474–82 (1991).

stronger networks of community (including government) support for relationships are correlated with longer lasting unions.¹⁷²

C. ENDING MARRIAGE'S MONOPOLY: THE EMERGING MENU OF RELATIONSHIP REGIMES

In 1911, civil marriage enjoyed a monopoly position in America's culture of sexual romance. State governments offered no other institution within which romantic couples could enjoy lives together—but, even more importantly, state governments made sexual relations outside of marriage a crime, usually a felony. State law had traditionally made it a serious crime for unmarried adults to enjoy penile–vaginal sex in private (fornication), for a married person to have such relations with someone other than his or her spouse (adultery), and for any person to commit the crime against nature (sodomy).¹⁷³ In addition, the federal government used the White-Slave Traffic (Mann) Act of 1910¹⁷⁴ to prosecute adultery and sometimes fornication when it involved crossing state lines.¹⁷⁵ As late as 1961, every state in the union treated consensual sodomy as a crime,¹⁷⁶ and forty-four states criminalized adultery.¹⁷⁷ Many states and municipalities also made sexual or lewd cohabitation outside of marriage a separate crime.¹⁷⁸ Like lesbian and gay couples, romantic heterosexual couples enjoying sexual relations outside of marriage were sexual outlaws, theoretically subject to criminal sanctions but, even more importantly, isolated from the normal channels of legal planning and protection.

Moreover, children born in nonmarital relationships were themselves mini-outlaws. Thus, state law denied nonmarital children the rights of parental support and inheritance that were guaranteed to marital children.¹⁷⁹ Fathers wanting support and custody of their nonmarital children were sometimes denied these opportunities, even when mothers put those children up for adoption.¹⁸⁰ States denied nonmarital children benefits from their workers' compensa-

172. See MARGARET F. BRINIG, *FAMILY, LAW, AND COMMUNITY: SUPPORTING THE COVENANT* (2010). See also Wardle, *supra* note 20, at 281–85 (reporting recent federal and state initiatives to provide encouragement and support for marriage).

173. See MORRIS PLOSCOWE, *SEX AND THE LAW* (1951) (providing a comprehensive survey of state sex crimes).

174. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)).

175. See, e.g., *Caminetti v. United States*, 242 U.S. 470, 487–91 (1917); Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 227 n.235 (1986). See generally DAVID LANGUM, *CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT* (1994) (providing a thorough account of the Mann Act's role in overbroad prosecutions of sexual laws).

176. See ESKRIDGE, *supra* note 33, at 387–407 app. (presenting a state-by-state survey of sodomy laws from 1789 to 2003, with documentation of each state's regime).

177. See sources cited *supra* note 119.

178. See Martha A. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite-Sex Couples*, 7 J.L. & FAM. STUD. 135, 141 (2005).

179. See HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 22–25 (1971); Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 478 (1967).

180. In *Petition of Malmstedt*, for example, the court ruled that it would not allow a child “to be reared as an illegitimate child by the father alone,” when the child could instead “be raised in a normal,

tion and wrongful death statutes.¹⁸¹ At the federal level, New Deal Era safety-net programs tended to exclude nonmarital children from those benefits as well.¹⁸²

Were these prohibitory laws actually enforced? In the early twentieth century, thousands of persons were arrested each year for violating the foregoing sex-crime laws, although police enforcement focused strongly, especially in the South, on racial, sexual, and gender minorities.¹⁸³ In the course of the century, governmental bars to sex outside of marriage were transformed by police practice into increasingly soft mandatory rules. Specifically, police enforcement of fornication and adultery laws steadily abated; by the 1940s, such laws were rarely enforced by the police.¹⁸⁴ According to the Kinsey reports released after World War II, few sexually active American women as well as men had confined their sexual activities to marital relationships; an overwhelming majority of adult Americans had violated one or more of these sex-crime laws.¹⁸⁵ However lax enforcement of these laws was in the 1940s and 1950s, the laws were dead letters by the 1970s.¹⁸⁶

wholesome [adoptive] home with a mother and father." 220 A.2d 147, 150 (Md. 1966). It then denied the father's petition to adopt his daughter on that basis. *Id.* Indeed, Georgia, Illinois, Mississippi, New Jersey, and Texas all excluded fathers from custody and adoption proceedings for their nonmarital children. Note, *Father of an Illegitimate Child—His Right To Be Heard*, 50 MINN. L. REV. 1071, 1076 n.29 (1966) (citing statutes from these jurisdictions); see also Norman Gardner Tabler, Jr., *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 231 (1971) ("In the United States today a man has few legal rights in his illegitimate child.").

181. E.g., *Levy v. State*, 192 So. 2d 193, 195 (La. Ct. App. 1966) (preventing recovery by "illegitimate and putative children for the wrongful death of a parent"), *rev'd*, 391 U.S. 68 (1968); *Stokes v. Aetna Cas. & Sur. Co.*, 242 So. 2d 567, 570 (La. 1970) (denying nonmarital children workmen's compensation, but granting marital children rights to such compensation), *rev'd sub nom. Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

182. See Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337, 353 (1962).

183. See GEOFFREY MAY, *SOCIAL CONTROL OF SEX EXPRESSION* 256–70 (1931) (reporting significant enforcement of adultery laws in the 1910s and 1920s); Geoffrey May, *Experiments in the Legal Control of Sex Expression*, 39 YALE L.J. 219, 244 (1929) (reporting that in 1916 Washington and Cincinnati, adultery arraignments totaled 131 and fornication arraignments totaled over 1000 and that in 1920 Boston, there were 70 arraignments for adultery and 321 arraignments for fornication); see also ESKRIDGE, *supra* note 33, at 55–57 (documenting significant albeit racially discriminatory enforcement of sodomy, fornication, and adultery laws in the early twentieth century).

184. See AM. LAW INST., *MODEL PENAL CODE AND COMMENTARIES: PART II DEFINITION OF SPECIFIC CRIMES* art. 213 at 434–37 (1980) (characterizing American adultery laws as "dead-letter statutes" by the 1950s); PLOSCOWE, *supra* note 173, at 155–56 (1951) (citing data demonstrating nonenforcement and noting that "non-enforcement is the general rule with respect to [criminal] statutes directed against fornication and adultery").

185. See KINSEY ET AL., *MALE*, *supra* note 62, at 392; KINSEY ET AL., *FEMALE*, *supra* note 62, at 255–59, 280–86, 419, 453.

186. Adultery laws were almost never enforced after 1961. See FRIEDMAN, *supra* note 118, at 346 ("In April 1990, when a district attorney in northern Wisconsin actually brought a prosecution for adultery, the story made the front page of the *New York Times*."); Katherine Annuschat, Comment, *An Affair To Remember: The State of the Crime of Adultery in the Military*, 47 SAN DIEGO L. REV. 1161, 1167–68 (2010). On the nonenforcement of consensual sodomy laws, see ESKRIDGE, *supra* note 33, at 170–73. Cohabitation laws may be the exception here, in the declining number of states that still had

At the same time the Kinsey researchers were publishing their reports, the American Law Institute (ALI) was launching its ambitious effort to draft and secure adoption at the state level of a model penal code. Professors Herbert Wechsler, the Reporter for the project, and Louis Schwartz, the Reporter for the sex crime portions of the project, approached sex-crime reform from a purely utilitarian approach to criminal law that explicitly rejected natural law baselines.¹⁸⁷ Thus, the drafters of the Model Penal Code were not inclined to criminalize conduct that pleased its perpetrators and did not harm other persons, and they did not care that such conduct violated some natural law ideal. Hence, the final version of the Code, ratified by the ALI in 1962, decriminalized consensual fornication, adultery, sodomy, and cohabitation.¹⁸⁸ One animating idea was to conform the law to practice: if citizens and police nullified a mandatory rule, without undue harm to society, why not formally change the rule to a default that could be overridden by the consent of the persons involved?

In 1961, Illinois was the first state substantially to adopt the Model Penal Code; in the next half century, most states have followed that lead, typically revising and adapting the Code to local politics.¹⁸⁹ Between 1961 and 2003, all but thirteen states decriminalized consensual sodomy, and the Supreme Court invalidated the remaining laws in 2003.¹⁹⁰ Twenty-two states today criminalize adultery, almost always as a misdemeanor¹⁹¹ usually unenforced by the police. Only four states criminalize sexual cohabitation,¹⁹² and another five states criminalize fornication¹⁹³—all as substantially unenforced and probably unconstitutional misdemeanors.

During the same period that state legislatures and judges were bringing nonmarital couples within the normal legal regulatory system, the Supreme

them. See Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 288–89 (reporting modest albeit uneven enforcement of the state cohabitation ban in the 1970s).

187. Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963); see ESKRIDGE, *supra* note 33, at 118–27 (providing a detailed account of the MPC's official philosophy and its decriminalization of consensual sex).

188. See Mahoney, *supra* note 178, at 144–47 (detailing history of the ALI's approach to cohabitation).

189. See ESKRIDGE, *supra* note 33, at 121–27, 144–47, 161–65, 176–84, 197–201 (detailing the complicated politics of sex-crime reform; many states followed the MPC to deregulate consensual fornication, cohabitation, adultery, and sodomy, while several states left “homosexual sodomy” regulated, usually as a misdemeanor).

190. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

191. See sources cited *supra* note 121.

192. See FLA. STAT. ANN. § 798.02 (West 2007); MICH. COMP. LAWS ANN. § 750.335 (West 2004); MISS. CODE ANN. § 97-29-1 (2006); VA. CODE § 18.2-345 (Westlaw 2010).

193. IDAHO CODE ANN. § 18-6603 (2004); 720 ILL. COMP. STAT. 5/11-40 (2010 & Supp. 2011) (fornication if “open and notorious”); MASS. GEN. LAWS ANN. ch. 272, § 18 (2000) (dubious constitutionality); MINN. STAT. §§ 609.34, 480.059(7) (2010); UTAH ANN. CODE § 76-7-104 (West 2010). Virginia still has a fornication statute, but its Supreme Court ruled in *Martin v. Zierl*, 607 S.E.2d 367 (Va. 2005), that the statute could not be applied to private consensual conduct.

Court issued a series of decisions bringing nonmarital children into the normal legal regulatory system. Specifically, the Supreme Court struck down a series of laws that excluded nonmarital children from ordinary property or inheritance rights and legal benefits.¹⁹⁴

As the foregoing account reveals, the one hundred years from 1911 to 2011 not only witnessed the expansion of marriage to allow millions of formerly outlaw couples to choose marriage but also allowed romantic couples of all stripes the possibility of romance under the law but outside of marriage. Once fornication and sexual cohabitation were formally decriminalized, as they were in most states by the 1970s, civil law rules of contract and property became applicable to nonmarital cohabiting couples in ways not typically possible before decriminalization. For example, written contracts and wills involving cohabiting partners were subject to legal objection on the ground that the underlying relationship was "meretricious," and decriminalization potentially legitimated those potential contract and property rights.¹⁹⁵

After sexual cohabitation became legal and normal rules of contract and property applied to cohabiting couples, many states in the last generation have taken a further regulatory step to create special rules tailored to the relationship presumptively created by cohabitation. Thus, some states have created new regulatory regimes that romantic couples—including the same-race, heterosexual couples who have always been able to get married—can choose instead of marriage. In other words, romantic couples can now flourish (or suffer) under the eye of the law without getting married, and in an increasing number of jurisdictions they are subject to a distinct regime of legal rights and regulations. Indeed, every state now offers a menu of regulatory institutions from which romantic couples can choose. The menu is different from state to state, and in most states it is a short one. But the number of states following a menu approach is expanding, and the regimes included within the menu have expanded as well.

The ongoing expansion, consolidation, and reevaluation of relationship menus will be a dominant feature of American family law in the next generation. Consider the new regimes that have been added to the family law menu of options since 1961. The big addition, both socially and legally, has been the regime of modern cohabitation law, but new regimes created as a response to the same-sex marriage movement and the traditional-family-values response are

194. See *Levy v. Louisiana*, 391 U.S. 68 (1968) (striking down state policy barring nonmarital children from recovery for the wrongful death of their mother); *Glonn v. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968) (striking down state policy barring mother from recovery for the wrongful death of her nonmarital child). See generally Christine H. Kellett, *The Burger Decade: More Than Toothless Scrutiny for Laws Affecting Illegitimates*, 57 U. DET. J. URB. L. 791 (1979) (surveying the Court's nonmarital-children cases).

195. See *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (applying normal contract principles of a cohabiting couple, and triggering similar lawsuits all over the country). But see *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (rejecting the *Marvin* approach and reaffirming the traditional rule that courts will not enforce contracts tainted by illicit, nonmarital sexual cohabitation).

theoretically important, because they expand the contours of the regulatory pluralism of modern family law. Not only have lesbian and gay couples been brought into the regulatory ambit of civil, rather than criminal, family law, but the new family law regimes also offer a different mix of default rules and benefits for all romantic couples.

1. Sexual Cohabitation

Before states decriminalized fornication and sexual cohabitation outside of marriage, cohabiting couples were not only presumptive criminals, but they also forfeited some basic civil protections and rights. For example, courts would not enforce ordinary support-and-maintenance contracts between cohabiting couples because judges assumed that the consideration for such contracts was the parties' "meretricious" relationship.¹⁹⁶ Courts would typically not even enforce support obligations on biological fathers when children were born out of wedlock.¹⁹⁷ Although tort and criminal law governed the partners' behavior toward one another (just as it would persons in a dating relationship), the law did not impose tort duties on third parties, such as a duty not to impose emotional distress on the partner of someone a defendant has accidentally injured or killed.¹⁹⁸

Once states decriminalized sexual activities outside of marriage, these civil disabilities were retired in most jurisdictions. In a large majority of jurisdictions, these disabilities were replaced with civil rules that brought cohabiting relationships within the normal rule of law; in an increasing number of jurisdictions, the legal disabilities have given way to a distinctive regime of rules governing cohabiting relationships.¹⁹⁹ With the caution that there are a variety of different state regimes for cohabiting couples, let me suggest the broad contours of the regulatory regime that has slowly been emerging over the last fifty years for cohabiting couples. The overall story is that state and federal governments have created a variety of legal default rules that are triggered once a romantic couple is "cohabiting." In every state, these default rules, and the

196. See Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 165 (1985) (discussing the traditional policy invalidating contracts between cohabitants); see also Jeffrey Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 263 (1981) (documenting judicial reluctance to enforce the intent of "homosexual" testators and life-insurance contractors through the doctrine of "undue influence").

197. See Murphy, *supra* note 127, at 326, 332 (explaining the traditional common law rules applicable to nonmarital children, including the rule against support by the biological father).

198. See *Elden v. Sheldon*, 758 P.2d 582, 588-90 (Cal. 1988) (summarizing the law prevailing almost everywhere in 1979, that third-party liability for harms to loved ones cannot be extended to cover injuries to persons unrelated by blood or by marriage).

199. The idea that cohabitation would become a new legal regulatory regime originated with Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981); see also William Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677 (1984); Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365 (2001) (criticizing the contract-based framework of *Marvin* as unworkable and ad hoc).

accompanying override rules, constitute a regulatory regime that gives form and imposes limitations on cohabiting partners. For the large majority of states, the regulatory regime is a bare-bones, minimalist regime where most of the default rules are “let the partners do what they want and the state will neither subsidize nor interfere,” but in an increasing number of states there are default rules entailing state regulation or support for cohabiting partners.

a. Duties of Support and Property Division. Before decriminalization of fornication and sexual cohabitation, state courts generally would not recognize cohabiting relationship-based contractual obligations, such as duties of support and maintenance. In its landmark ruling of *Marvin v. Marvin*,²⁰⁰ the California Supreme Court held that courts could enforce express or implied contracts for mutual support between cohabiting persons. Since *Marvin*, almost all states have recognized contract-based claims for “palimony” relief to enforce support and other obligations where one of the partners has relied on promises.²⁰¹ The large majority of states have followed the default rule that cohabiting partners have not agreed to support one another, with the override rule (typical in contract cases) that the parties can supersede that default by express or implied agreement.²⁰²

Some states are willing to infer partners’ agreement to support or to share property from the fact that one partner took care of the household, allegedly “in return” for the other partner’s tacit agreement to support the household financially.²⁰³ In those states, the finding that the couple is engaged in a cohabiting relationship more or less creates a new default rule, where the partners in a longer term cohabiting relationship are presumed to be mutually supportive or

200. 557 P.2d 106 (Cal. 1976).

201. See Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 L. & Pol’y 119, 126 (2004) (surveying post-*Marvin* practice in the various states).

202. E.g., *Burns v. Koellmer*, 527 A.2d 1210 (Conn. App. Ct. 1987); see Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225 (2004) (surveying and endorsing the contract-based approach most states have taken since *Marvin*). There are three states with leading (albeit dated) court opinions ruling against enforcement of contracts between cohabiting partners. See *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. Ct. App. 1983); *Thomas v. La Rosa*, 400 S.E.2d 809 (W. Va. 1990).

203. E.g., *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Carroll v. Lee*, 712 P.2d 923 (Ariz. 1986); *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000); *Burns v. Koellmer*, 527 A.2d 1210 (Conn. App. Ct. 1987); *Mason v. Rostad*, 476 A.2d 662 (D.C. 1984); *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. Ct. App. 1980) (implied contract for support but not property sharing); *Tyranski v. Piggins*, 205 N.W.2d 595 (Mich. Ct. App. 1973) (cautious application of this rule); *Kinkenon v. Hue*, 301 N.W.2d 77 (Neb. 1981); *Hay v. Hay*, 678 P.2d 672 (Nev. 1984); *In re Estate of Roccamonte*, 808 A.2d 838 (N.J. 2002); *Collins v. Davis*, 315 S.E.2d 759 (N.C. Ct. App. 1984), *aff’d per curiam*, 321 S.E.2d 892 (N.C. 1984); *Beal v. Beal*, 577 P.2d 507 (Or. 1978); *Knauer v. Knauer*, 470 A.2d 553 (Pa. Super. 1983); *Doe v. Burkland*, 808 A.2d 1090 (R.I. 2002) (imposing property sharing but not contractual support payments); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987). States are less likely to find “implied” agreements of support or property division if the cohabiting relationship has been a short one. E.g., *Landreth v. Malik*, 221 P.3d 1265 (Nev. 2009).

to share property.²⁰⁴ The movement from contract back to (quasi-)status may be a subtle one. For example, *Marvin* recognized that palimony rights could arise from an implied contract, and some states will “imply” a contract when one partner in a longer term cohabiting relationship specializes in managing the household or raising the couple’s children, while the other partner specializes in creating a money-earning career.²⁰⁵

A number of states have provided, either by court decision or by statute, that only an express and not an implied contract can provide rights of support or property settlement.²⁰⁶ But courts in some of those states have ruled that cohabiting partners can sue for unjust enrichment with much the same effect: by providing household services or support for a partner’s career or business, the claiming partner has established an equitable basis for recovering the value of her or his services.²⁰⁷ In Mississippi, for example, courts will not enforce an implied contract for support of a dependent cohabiting partner—but they may exercise their equity authority to order a fair partition of the assets of a cohabiting couple upon break up,²⁰⁸ and sometimes to order compensation for household services rendered during the partnership.²⁰⁹

Even if a judge concludes that a dependent person is presumptively entitled to support from or an equitable division of property by her or his cohabiting partner, that presumption is rebuttable. Thus, the palimony defendant would usually be able to override the default through evidence that there was an explicit (or perhaps implicit) cohabitation agreement excluding support obligations—but the key inquiry in many of the reported cases is whether there exists a cohabiting marriage-like relationship, namely, one entailing long-term commitment, intermingling of resources, and specialization of responsibilities (that is, one partner runs the household and has primary care for any children); if this finding is made, obligations flow to the dependent partner.²¹⁰

204. See Grace G. Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1266 (2001). Some states have rejected the notion that a marriage-like division of responsibilities between cohabiting partners creates a new default. *E.g.*, *Poe v. Levy’s Estate*, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982); *Champion v. Frazier*, 977 S.W.2d 61 (Mo. Ct. App. 1998).

205. See cases cited in *supra* note 203.

206. *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992); *Wilcox v. Trautz*, 693 N.E.2d 141, 145 n.3 (Mass. 1998); *Merrill v. Davis*, 673 P.2d 1285 (N.M. 1983); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980); see also MINN. STAT. §§ 513.075–.076 (West 2010) (requiring that contracts between cohabiting partners be in writing, with two witnesses).

207. See *Phillips v. Blankenship*, 554 S.E.2d 231 (Ga. Ct. App. 2001); *In re Estate of Palmen*, 588 N.W.2d 493 (Minn. 1999); *Gfrerer v. Lemcke*, No. A08-0873, 2009 WL 749584 (Minn. Ct. App. Mar. 24, 2009).

208. *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986).

209. *Wooldridge v. Wooldridge*, 856 So. 2d 446 (Miss. Ct. App. 2003).

210. *E.g.*, *W. States Constr. Co. v. Michoff*, 840 P.2d 1220 (Nev. 1992) (finding an implied contract from the couple’s intertwined lives and applying state community-property law “by analogy”). Although they recognize contractual rights implied from cohabitation, the large majority of state courts go out of their way to say that “cohabitation” per se does not create specific property rights. *E.g.*, *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. Ct. App. 1980).

Even in the large majority of states where cohabitation is not treated as a status per se, practitioners are publicizing the rights and duties of cohabiting couples—and are outlining standardized cohabitation agreements that address issues such as support obligations, joint property rights, qualification for safety-net programs, and so forth.²¹¹ Following *Marvin*, many states providing partners with support or property-division rights based upon express or implied contracts have also recognized unjust enrichment claims.²¹²

Not only has cohabitation been legalized and rights and responsibilities created for cohabiting couples, but discrimination against children born outside of marriage is also now legally off-limits. Hence, support obligations of cohabiting partners typically apply to children born within their relationship; the default rule for cohabiting relationships is that a child's biological father and mother both owe the child duties of support and maintenance.²¹³ Correlatively, the biological father can often assert parental rights as well as suffer the duties even if he is not cohabiting with the biological mother.²¹⁴ Lesbian and gay families have taken this precept one step further. Even though children born and raised within their relationships are not the biological progeny of both cohabiting partners and thus the default is no parental rights, most states now afford the nonbiological partner the override opportunity to establish parental rights, either through second-parent adoption or de-facto or psychological parenting.²¹⁵ Although beyond the scope of this Article, it is important to note that lesbian and gay parents have been at the cutting edge of alternative reproductive technologies (such as artificial forms of insemination) and practices (such as surrogacy).

211. See, e.g., LAWRENCE CHEESEMAN, RIGHTS OF PARENTS AND COHABITANTS IN CONNECTICUT § 3.4 (2009) (setting forth contract provisions cohabiting couples should consider); WOMEN'S LAW CTR. OF MD., INC., THE RIGHTS OF UNMARRIED COHABITANTS IN MARYLAND 11–12 (2d ed. 2002), available at <http://www.mlcmd.org/pdf/publications/UnmarriedCohabitants.pdf> (setting forth issues that cohabiting couples might easily settle by contract).

212. E.g., *Hay v. Hay*, 678 P.2d 672, 674 (Nev. 1984); *Kozlowski v. Kozlowski*, 403 A.2d 902, 909 (N.J. 1979); *Collins v. Davis*, 321 S.E.2d 759, 761 (N.C. Ct. App.), *aff'd per curiam*, 321 S.E.2d 892 (N.C. 1984); *Doe v. Burkland*, 808 A.2d 1090, 1095 (R.I. 2002); *Watts v. Watts*, 405 N.W.2d 303, 532 (Wis. 1987).

213. See, e.g., CONN. GEN. STAT. § 45a-606 (2011) (biological father and mother are jointly responsible for the welfare of a child, without respect to marital status).

214. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (striking down a law that denied a putative father the right to seek parental rights to his biological child, even though the father had not been a caregiver for the child); Robin Cheryl Miller, Annotation, *Right of Putative Father to Visitation with Child Born out of Wedlock*, 58 A.L.R.5th 669 (1998) (West, Westlaw updated with current cases weekly) (collecting cases concerning visitation rights of putative fathers for children born out of wedlock). But see *Lehr v. Robertson*, 463 U.S. 248 (1983) (upholding the constitutionality of state laws requiring putative fathers to “grasp the opportunity” to have a relationship with the child before he can claim parental rights).

215. See ESKRIDGE & HUNTER, *supra* note 8, at 1143–44 app. 8 (providing state-by-state survey of allowances for second-parent adoption or de facto parental rights for lesbian and gay partners; adoption provides full parental rights for the second parent, but de facto parenting usually provides only some parental rights); Ann K. Wooster, Annotation, *Adoption of Child by Same-Sex Partners*, 61 A.L.R.6th 1 (2011) (providing survey of case law recognizing or refusing to recognize adoptions by lesbian and gay persons and couples).

Some states have created a new default rule for property division when cohabiting couples split up. Washington, for the best example, will apply its community-property rules to govern partition of assets upon separation if the cohabiting couple is found to have a committed marriage-like relationship.²¹⁶ Other states will apply common law doctrines of constructive trusts to recognize property rights that can be enforced by one partner against another upon the dissolution of the cohabiting relationship.²¹⁷ In its *Principles* for family dissolution, the ALI proposes that states apply the same property-division and support rules to cohabiting couples that they apply to married couples.²¹⁸ No state has explicitly adopted the ALI's *Principles*, however, and the fate of this particular proposal remains uncertain.

b. Special Rules and Structures for Domestic Disputes. The default rule provided by American tort law is that all persons are entitled to be free from assault, including sexual assault, from other persons. As noted above, that default rule is typically applicable to married couples, now that the marital-rape exemption has been revoked or substantially repealed at the state level. Indeed, the old default (nonintervention in domestic disputes) has been substantially reversed, for government now treats domestic violence as a particularly pressing problem and recognizes that abuse by a family member or intimate partner tends to be more destructive than abuse by strangers.

Thus, every American state and the District of Columbia have created special protections for victims of domestic violence—and thirty-seven states and the District of Columbia have, in explicit statutory language, extended those protections to cohabiting couples as well as married couples.²¹⁹ An increasing number

216. See, e.g., *Connell v. Francisco*, 898 P.2d 831, 837 (Wash. 1995); *Foster v. Thilges*, 812 P.2d 523, 524–26 (Wash. Ct. App. 1991); *Hay v. Hay*, 678 P.2d 672 (Nev. 1984). This is decidedly the minority rule. A large majority of state courts have explicitly declined to apply marital-property-settlement laws to cohabiting couples. See, e.g., *Marvin v. Marvin*, 557 P.3d 106, 120 (Cal. 1976).

217. See generally George L. Blum, Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 69 A.L.R.5th 219 (1999) (West, Westlaw updated with current cases weekly) (survey of state court deployment of constructive trust and other common law doctrines to protect the interests of cohabiting partners upon breakup).

218. AM. LAW INST., *PRINCIPLES FOR FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* ch. 6 (2002); see ROBIN FRETWELL WILSON, *RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* (2006) (collecting essays criticizing the ALI's *Principles*; most of the essays suggest, and some insist, that the *Principles* will have little influence upon state legislative reform of family law); Blumberg, *supra* note 204, at 1295–99 (explaining the ALI's approach and contrasting it to the approach taken in most states). Note that the Chief Reporter for the ALI's *Principles* is Professor Ellman, and the Reporter for Chapter 6 is Professor Blumberg; they are the law professors who have been most influential in support of the idea that cohabitation should be regularized as a status and regulated like marriage, rather than left entirely to ad hoc contract-based rules. See sources in note 199, *supra*.

219. See Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1888–98 app.B (2006) (documenting the statutory coverage of domestic-abuse laws as of 2006 in a state-by-state survey). See generally EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* (3d ed. 2003) (providing a historical analysis of the evolving state response to domestic violence by intimate partners as well as spouses).

of jurisdictions extend those protections to cohabiting same-sex as well as different-sex couples.²²⁰ Under this statutory regime, domestic-violence complaints are given priority by law-enforcement officials, and there are special procedures for expeditious adjudication of violence-based claims, with injunctive relief tailored to the particular circumstances. Additionally, the Violence Against Women Act of 1994 (as amended in 2006) makes it a federal crime to cross state lines to commit violence against a “spouse, intimate partner, or dating partner.”²²¹

c. Regulatory Rights and Benefits for Cohabiting Couples. In the early decades of the new *Marvin* era, states recognizing reciprocal rights and duties of cohabiting couples usually declined to recognize rights of partners vis-à-vis third parties.²²² In a leading case, *Elden v. Sheldon*,²²³ the California Supreme Court ruled that a gay person did not have a cause of action for negligent infliction of emotional distress from witnessing the death of his cohabiting partner. The court reasoned that it would be unfair to impose regulatory burdens upon third parties unless the couple were married.²²⁴

Although *Elden* still represents the majority rule, the trend in the case law is toward recognition of common law claims for relief by cohabiting partners against third parties.²²⁵ As another leading case has recognized, the tort of

220. See Shannon Little, Note, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN'S L.J. 259, 264–69 (2008); see, e.g., *Peterman v. Meeker*, 855 So. 2d 690, 691 (Fla. App. 2003); *Ireland v. Davis*, 957 S.W.2d 310, 312 (Ky. Ct. App. 1997); *State v. Yaden*, 692 N.E.2d 1097, 1101 (Ohio Ct. App. 1997). See generally Colker, *supra* note 219, at 1888–98 app.B (providing state-by-state survey as of 2006); Robin Miller, Annotation, *Validity of Legal Claim Predicated on Nonmarital Same-Sex Relationship*, 8 A.L.R.6th 339 (2005) (West, Westlaw updated with current cases weekly) (collecting cases).

221. See Violence Against Women Act of 1994, codified in part as 18 U.S.C. § 2261 (2006) (making it a crime to travel interstate to commit domestic violence against an “intimate partner”); *id.* § 2261A (making “interstate stalking” of an “intimate partner” a federal crime); *id.* § 2262 (making interstate travel to violate a “protection order” for an intimate partner a federal crime).

222. *Bulloch v. United States*, 487 F. Supp. 1078, 1079 (D.N.J. 1980) (discussing cases from other states that both held marriage is a prerequisite to recovery and then only permitted recovery for cohabiting couples upon a finding of common law marriage); John G. Culhane, A “*Clanging Silence*”: *Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 947 (2001) (“While legal spouses have recovered for injuries to the other spouse, those in ‘spouse-like’ relations have usually not been successful.”).

223. 758 P.2d 582 (Cal. 1988).

224. See *id.*; see also *Butcher v. Superior Court of Orange Cnty.*, 139 Cal. App. 3d 58 (Cal. 1983) (similar result for heterosexual cohabiting partner).

225. See *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994) (allowing cohabitants in an “intimate familial relationship” to recover for negligent infliction of emotional distress in the event of a cohabitant’s death or grievous bodily injury); see also *Yovino v. Big Bubba’s BBQ, L.L.C.*, 896 A.2d 161, 165, 167 (Conn. Super. Ct. 2006) (holding that engaged couples may be considered “closely related” for recovery from a bystander emotional-distress claim); *Graves v. Estabrook*, 818 A.2d 1255, 1262 (N.H. 2003) (allowing recovery to an engaged cohabitant); *Binns v. Fredendall*, 513 N.E.2d 278 (Ohio 1987) (Holmes, J., concurring in part and dissenting in part) (accepting “the new law . . . which allows recovery by a person unrelated by blood or law, but who is a loved one of the deceased” in a case involving cohabitants). For examples of similar recovery for other third-party relationships,

negligent infliction of emotional distress compensates partners with “deep, intimate, familial ties” for the loss of, essentially, the utilitarian joys and benefits imposed by harm to the victim.²²⁶ The California Supreme Court had recognized the utilitarian loss in *Elden* but feared that recognizing liability to cohabiting partners would be hard to police and would yield expansive liability; subsequent judges have not been so reluctant and have recognized the primacy of the utilitarian harm suffered by cohabiting as well as married partners.²²⁷

The primary situs for intimate-partner claims are not in the law of tort, however. State entitlement programs often include benefits for a person’s family, and it is a natural impulse for committed partners to wonder why they should not be included. Although there are thus far few cases litigating such benefits for LGBT families, the trend in gay-friendly jurisdictions is to include such families in state regulatory programs.²²⁸ In a pioneering decision, a California court ruled that the state workers’ compensation law entitles a dependent person to benefits for injury to her or his same-sex partner.²²⁹ This decision makes great regulatory sense: because the purpose of workers’ compensation laws is to protect family members who depend on the wages of the injured worker, such laws should be interpreted, where textually possible, to reflect the pluralism of our current array of family forms. In New York City, for another example, the court of appeals ruled that municipal regulations granting “family” members the right to step into the shoes of a decedent’s rent-controlled lease agreement apply to cohabiting partners as well as spouses.²³⁰ This 1989 ruling was an early example of judicial translation of the plurality of actual family relationships into a modern family law.

In short, cohabiting couples are already subject to an array of legal rights, duties, and regulations that would not apply to romantic couples who are just dating and that would not have applied to cohabiting couples a generation ago. In an increasing number of states, cohabitation has become a reasonably coherent legal regime that is not just a private alternative to marriage but is also

see *Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979); *Hislop v. Salt River Project Agric. Improvement & Power Dist.*, 5 P.3d 267 (Ariz. Ct. App. 2000); *Richmond v. Shatford*, No. CA 941249, 1995 WL 1146885, at *3 (Mass. Super. Ct. Aug. 8, 1995); *James v. Lieb*, 375 N.W.2d 109 (Neb. 1985); *Thurmon v. Sellers*, 62 S.W.3d 145 (Tenn. Ct. App. 2001); and *Heldreth v. Marrs*, 425 S.E.2d 157 (W. Va. 1992).

226. *Dunphy*, 642 A.2d at 374.

227. See, e.g., *id.* at 377–80 (rejecting the *Elden* concerns and following the *Elden* dissenting opinion).

228. A useful survey is Miller, *supra* note 220.

229. See *Donovan v. Workers’ Comp. Appeals Bd.*, 187 Cal. Rptr. 869 (Cal. App. 1982). This is an area where there will surely be more cases in the future. See POLIKOFF, *supra* note 14, at 196–202 (arguing that workers’ compensation regimes ought to recognize losses to partners and children in nontraditional relationships entailing commitment and dependency); Miller, *supra* note 220, at § 10.1.

230. See *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 53–54 (N.Y. 1989) (interpreting the municipal law and its regulations to include same-sex as well as different-sex cohabitating partners as “family” entitled to assume the decedent’s rights to rent-controlled housing); Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529 (2009) (situating *Braschi* within the larger reconfiguration of a more pluralistic family law).

a regulatory alternative to civil marriage. Importantly, LGBT persons in a coupled relationship increasingly have access to this legal regime.

In addition to this cohabitation regime, straight couples also have the option to marry in every state of the union; hence, they have access to a menu of options rather than the old take-it-or-leave-it option of getting married. Interestingly, straight couples also have at least one other legal option in most states—an option that is a byproduct of the same-sex-marriage debate, namely, domestic-partnership rights. Likewise, lesbian and gay couples also have access to a menu of regulatory regimes in an increasing number of states, a direct result of the LGBT rights movement.

2. Domestic Partnership/Reciprocal Beneficiaries/Civil Unions

Just as cohabiting straight couples came out of the closet in a big way during the 1960s and 1970s, so lesbian and gay couples came out of their closets in a big way during the 1980s and 1990s.²³¹ Both social events have changed the way Americans think about families, and both have yielded legal innovations that have added to the menu of relationship regimes. The traditional exclusion of same-sex couples from civil marriage has yielded a generation of intense legal-reform efforts by gay rights organizations to secure relationship rights for lesbian and gay couples. That law-reform movement has generated a debate that has transformed American family law and its discourse.

To begin with, the gay-marriage movement has revived and transformed the “traditional family values” (TFV) social movement of the 1970s.²³² Originally committed to ensuring some state discrimination against gay people, the TFV movement found itself on the defensive in the early 1990s, when Americans were embracing a tolerant stance toward this sexual minority. In the mid-1990s, however, the Hawaii Supreme Court’s suggestion that marriage laws unconstitutionally discriminate against same-sex couples²³³ enabled the TFV movement to shift its public stance away from discriminating against gay people toward “defending” marriage from access by couples deemed too distant from the core purposes of marriage.²³⁴

Even more interesting, the TFV movement shifted its anti-gay-marriage rhetoric away from the natural law baseline that inspired its religious leaders and toward the utilitarian baseline that has become the dominant discourse in

231. *E.g.*, LAURA BENKOV, *REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS* 16–33 (1994).

232. *See* ESKRIDGE, *supra* note 33, at 201–18 (tracing the galvanizing effect of gay rights on the emerging “traditional family values” social movement of the 1970s).

233. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw.), *clarified by* 852 P.2d 74 (Haw. 1993) (holding that the state bar to same-sex marriage is sex discrimination subject to strict scrutiny under the state constitution).

234. For the TFV backlash to marriage equality in general and to *Baehr* in particular, see ESKRIDGE, *supra* note 33, at 9–12, 26–42.

family law.²³⁵ Starting in the mid-1990s, the case for denying marriage equality to LGBT persons moved away from their supposed “perversion,” and even away from traditional fears about “predatory” homosexuality, the old natural law discourse. Increasingly, their rhetoric shifted toward the openly utilitarian argument that gay marriage is a bad idea because it would undermine “traditional marriage” that brings such great happiness and good health to most straight men, many women, and their children.²³⁶

Thus, even though TFV supporters swept the field politically between 1993 and 2009, they did so, in part, by abandoning their core moral philosophy and acquiescing in their opponents’ utilitarian emphasis. Supporters of marriage equality emphasized the happiness that marriage can bring to committed lesbian and gay couples; opponents emphasized that equality for “homosexuals” came at a cost of less happiness for heterosexuals and the proverbial “wavering adolescent” trying to make up her mind about which sexuality to “choose.”

Because of public support for the TFV position, gay rights supporters had in the 1980s abstained from demands for access to marriage and had focused, instead, on easier-to-secure municipal and corporate partnership policies. Once the gay-marriage movement took off in earnest in the 1990s, moreover, traditionalist opponents were still successful in holding off access to marriage. This strategy had the unintended consequence of driving legislators in the emerging gay-tolerant states to create new institutions for recognizing committed relationships. These new family law institutions have, perhaps provisionally, enriched the menu of regulatory regimes the state offers straight as well as lesbian and gay couples.

a. Domestic Partnership: Employment Benefits. In the early 1980s, gay marriage was not politically viable, but gay rights leaders devised another strategy to secure legal recognition of their relationships, namely, domestic-partnership ordinances adopted at the municipal level, where lesbian and gay political power was greatest.²³⁷ Because municipalities cannot create most of the legal rights and duties of state family law, the benefits of domestic partnership ordinances have typically been limited to health insurance and other employment benefits for partners of municipal employees and visitation rights for

235. On the modernization of antigay discourse in general and the TFV response to marriage equality in particular, see ESKRIDGE & SPEDALE, *supra* note 13, at 20–31, 37–41.

236. E.g., David Blankenhorn, Opinion, *Protecting Marriage To Protect Children*, L.A. TIMES (Sept. 19, 2008), <http://www.latimes.com/news/opinion/commentary/la-oe-blankenhorn19-2008sep19,0,6057126.story>; Wardle, *supra* note 11, at 289–90, 299–301 (emphasizing utilitarian arguments for preserving the traditional “boundaries” of marriage); Lynn D. Wardle, *What Is Marriage*, 6 WHITTIER J. CHILD & FAM. ADVOC. 53 (2006) (emphasizing functional, that is, utilitarian, arguments supporting the traditional definition of marriage of one man, one woman). See also sources in note 273, *infra*.

237. See ESKRIDGE, *supra* note 23 (noting that San Francisco and Berkeley, California, were gay-friendly cities where domestic-partnership ordinances were adopted after some controversy from 1984 to 1990).

persons whose partners are hospitalized.²³⁸ Dozens of cities and counties all over the country now maintain domestic-partnership registries.²³⁹

Embracing the same idea, corporations created their own domestic-partnership policies, allowing lesbian and gay employees to designate partners who could receive employee benefits previously reserved for spouses.²⁴⁰ For most couples, the biggest benefit of such policies is that the employee's domestic partner can be added as a health-insurance beneficiary on roughly the same terms as a married partner. Other employee benefits available to such partners include free or discounted travel and other employer services, use of employer facilities, attendance at employer-sponsored functions, and time off to care for one's domestic partner.²⁴¹ Although large corporations have flocked to the banner of domestic partnership on the ground that it makes business sense, it is noteworthy that TFV supporters have pushed back with arguments framed by the utilitarian understanding explored in this Article; specifically, they maintain that domestic partnership, especially for gay employees, is bad for corporate culture because it discourages marital relationships that are the best foundation for personal happiness and employee productivity.²⁴²

Increasingly, both municipalities and corporations have opened up their domestic-partnership policies to different-sex as well as same-sex cohabiting partners.²⁴³ As a result, the menu for straight couples in many jurisdictions includes domestic partnership, as well as cohabitation and marriage, as options on the menu of regime choices most romantic couples enjoy.

b. Reciprocal Beneficiaries: Unitive Rules. Lesbian and gay couples were not content to fight for domestic-partnership policies and increasingly (after 1989) demanded the right to marry as well. In 1993, the Hawaii Supreme Court ruled

238. See Raymond O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163 (1995); Craig Bowman & Blake Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992); Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1072-77 (1990).

239. For a listing of most of these registries, see *City and County Domestic Partner Registries*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/city-and-county-domestic-partner-registries> (last visited Mar. 23, 2012).

240. See, e.g., Blumberg, *supra* note 204, at 1282-92 (providing first-person account of the politics and drafting of the University of California's provision of health-insurance benefits to lesbian and gay employees through domestic partnership in 1997).

241. EMP. BENEFIT RESEARCH INST., *Domestic Partner Benefits: Facts and Background*, FACTS FROM EBRI, <http://www.ebri.org/pdf/publications/facts/0209fact.pdf> (last updated Feb. 2009) (finding fifty-four percent of surveyed corporations offered domestic-partnership policies to unmarried but partnered employees and describing the benefits offered by such policies).

242. CORPORATE RESEARCH COUNCIL, *DO DOMESTIC PARTNER BENEFITS MAKE GOOD BUSINESS SENSE?* (2002), available at http://www.corporateresourcecouncil.org/white_papers/DP_Good_Business_Sense.pdf (arguing that domestic-partner benefits do not make good business sense and invoking the TFV literature grounded upon utilitarian arguments).

243. Thus, almost all of the municipal partnership registries reported in *City and County Domestic Partner Registries*, *supra* note 239, are open to different-sex as well as same-sex partners.

that the exclusion of same-sex couples from civil marriage constituted a sex-discriminatory policy subject to strict scrutiny under the state constitution.²⁴⁴ A national firestorm of protest followed the court's decision, and the Hawaii Legislature placed before the voters a constitutional amendment allowing marriage to be restricted to different-sex couples; the voters adopted the amendment, foreclosing marriage equality in that state.²⁴⁵ But as part of the deal placing same-sex marriage on the ballot, the legislature also created a new institution, reciprocal beneficiaries, that was available for same-sex and some different-sex couples.²⁴⁶

The Hawaii statute created a new institution for couples who were barred from getting married under Hawaii law.²⁴⁷ Becoming a reciprocal beneficiary is as easy as filling out a form.²⁴⁸ Once a couple has properly registered, they are legal beneficiaries until death or until one party files another document terminating the legal relationship; hence, "divorce" is much easier in this relationship than it is in marriage.²⁴⁹ The 1997 law recognized about five dozen legal rights and duties associated with marriage that reciprocal beneficiaries could access. Among the rights and duties available to reciprocal beneficiaries are the following:

- partner health insurance, pension, and other benefits employers are required to provide for spouses;²⁵⁰
- workers' compensation benefits;²⁵¹
- inheritance rights;²⁵²
- the right to own property jointly as "tenants in the entirety";²⁵³
- the right to sue third parties for the wrongful death of one's partner;²⁵⁴
- and rights to visit one's partner in the hospital and to make healthcare decisions for him or her if incapacitated.²⁵⁵

The Reciprocal Beneficiaries Act of 1997 provides the hospital and health insurance benefits that ordinary domestic-partnership ordinances provided, plus an array of *unitive benefits and rights* similar to those accorded spouses. Unlike

244. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

245. See ESKRIDGE, *supra* note 23, at 22–42 (providing a detailed account of the political backlash after the court's decision in *Baehr*).

246. See A Bill for an Act Relating to Unmarried Couples, 1997 Haw. Sess. Laws 383 (codified in Haw. Rev. Stat. §§ 572C-1 to -7 (2011)).

247. See *id.* § 1 (codified at Haw. Rev. Stat. § 572C-4 (2011)).

248. See *id.* § 1 (codified at Haw. Rev. Stat. § 572C-5 (2011)) (registration).

249. See *id.* § 7 (codified at Haw. Rev. Stat. § 572C-7 (2011)) (dissolution).

250. *Id.* §§ 9, 22–33.

251. *Id.* § 29.

252. *Id.* §§ 12–19.

253. *Id.* § 10.

254. *Id.* § 20.

255. *Id.* § 3.

cohabitation regimes, the Hawaii reciprocal-beneficiary regime does not impose rights of support and property division such as those imposed by the cohabitation regimes of some states. In 2000, the Vermont Civil Unions Law included a provision creating a new institution of reciprocal beneficiaries, open to all persons who wanted to create a caregiving relationship.²⁵⁶

In 2009, the Colorado Legislature created a new institution for “designated beneficiaries.”²⁵⁷ The statute provides a form contract that can be the basis of a same-sex or different-sex couple’s agreement to serve as one another’s designated beneficiaries. Epitomizing the new family law pluralism described in this Article, each person can choose whether to opt into or opt out of a legal default simply by checking a line on the form.²⁵⁸ Among the defaults that either or both partners can opt into are property ownership as joint tenants; status as the presumptive beneficiary of a trust, will, retirement policy, or insurance policy; priority to become the guardian, personal representative, or executor for the other partner; status as a surrogate healthcare decision maker in the event of the partner’s incapacitation; and rights to workers’ compensation benefits and to suit for wrongful death.²⁵⁹

Similar laws have been adopted, under the rubric of “domestic partnerships,” in Maine, Maryland, and Wisconsin.²⁶⁰ Like the Hawaii reciprocal-beneficiary law and the Colorado designated-beneficiary law, these particular domestic-partnership laws provide what might be deemed *unitive defaults*, namely, default rules that reflect the realistic assumption that each partner wants the other to be her or his beneficiary, surrogate decision maker, or heir, should something befall the partner.

c. Civil Unions: Rights and Duties of Marriage, Without the Name. Although same-sex marriage did not fly in Hawaii, six (and potentially eight) states and the District of Columbia extended marriage rights to lesbian and gay couples between 2003 and 2012.²⁶¹ Ten states (including Hawaii) and the District of

256. See VT. STAT. ANN. tit. 15, § 1303 (2011).

257. Colorado Designated Beneficiary Agreement Act, 2009 Colo. Legis. Serv. ch. 107 (codified at COLO. REV. STAT. §§ 15-22-101 to -112 (2011)).

258. See COLO. REV. STAT. §§ 15-22-104, 15-22-106 (2011) (specifying the form that must be “substantially” followed to designate a beneficiary).

259. See *id.* § 15-22-106 (list of defaults that each partner can opt into or out of).

260. An Act To Promote the Financial Security of Maine’s Families and Children, 2004 Me. Legis. Serv., ch. 672 (2004) (codified in various parts of Me. Laws) (new institution of “registered domestic partners”); 2009 Md. Laws ch. 602; 2008 Md. Laws chs. 590, 599 (new institution of “domestic partnership”); WIS. STAT. § 770 (2011) (new institution of “domestic partnership”).

261. The states are Massachusetts (2003–04), Vermont (2009), Connecticut (2008), New Hampshire (2009), Iowa (2009), and New York (2011). Washington (2012) and Maryland (2012) have adopted statutes recognizing same-sex marriages, but they will not take effect until after voter referenda taking place in November 2012. California has provided marriage equality by court decisions, fleetingly in 2008 (after *The Marriage Cases*) and provisionally in 2012 (*Perry v. Brown*, 671 F.3d 1052, 1064–95 (9th Cir. 2012)). Maine (2009) recognized marriage equality, but a voter initiative revoked that recognition before the statute could take effect. See sources cited *supra* note 102 and accompanying text.

Columbia have created new institutions of civil unions and statewide domestic partnerships that provide lesbian and gay couples all of the legal rights and duties of marriage, without the hallowed name.²⁶²

In fifteen state-level jurisdictions, including California and New York, lesbian and gay couples have access to more or less the same menu of regimes that straight couples have access to, namely (1) local and private domestic-partnership employee benefits, (2) cohabitation, and (3) either marriage or civil unions.²⁶³ Nevada presents an interesting variation: in addition to local and private domestic partnership, both straight and gay couples have access to cohabitation and civil-union regimes (which Nevada calls “domestic partnerships”), but straight couples also have a fourth choice of civil marriage. In the District of Columbia, same-sex and different-sex couples have access to employer-provided domestic partnership, to a cohabitation regime, to a civil-union-like governmental domestic-partnership status, and to civil marriage. Hawaii presents another variation: in addition to state, municipal, and private domestic-partnership benefits, both straight couples and gay couples have a choice of either cohabitation or marriage/civil-union regimes, but romantic gay couples (and some nonromantic straight couples) *also* have a choice of the reciprocal-beneficiary regime.

Contrast the menu in these jurisdictions with the one in Colorado. Lesbian and gay couples in Colorado have access to (1) local and private domestic-partnership employee benefits, (2) cohabitation, and (3) designated beneficiaries. Straight couples in that state have all of these options, including the new designated-beneficiary regime, as well as civil marriage. A similar contrast

262. The original civil-unions law was adopted by Vermont in 2000. *See* ESKRIDGE, *supra* note 23, at ch. 2. When that state’s legislature recognized same-sex marriages, the civil-unions experiment was terminated. Since 2000, Delaware, Hawaii, Illinois, New Jersey, and Rhode Island have recognized civil unions for same-sex couples. DEL. CODE ANN. tit. 13, §§ 201–17 (West, Westlaw through 78 Laws 2012); HAW. REV. STAT. §§ 572B-1 to -11 (West, Westlaw through Act 235 of the Reg. 2011 Legis. Sess.); 750 ILL. COMP. STAT. 75/1–90 (2010); N.J. REV. STAT. §§ 37:1-28–36 (West 2012); R.I. GEN. LAWS ANN. §§ 15-3.1–11 (West 2011); VT. STAT. ANN. tit. 15, §§ 1201–07 (West 2012). California, the District of Columbia, Nevada, Oregon, and Washington have created a new statewide institution of *domestic partnership* for same-sex couples along the same lines as the Vermont civil-unions statute. D.C. CODE §§ 32-701 to -710 (2010); NEV. REV. STAT. ANN. §§ 122A.200–10; OR. REV. STAT. ANN. §§ 106.300–40 (West 2012); WASH. REV. CODE ANN. §§ 26.60.010–901. The Nevada and the District of Columbia domestic-partnership laws include different-sex as well as same-sex partners. *See* OFFICE OF THE ATTORNEY GEN., GOV’T OF D.C., DOMESTIC PARTNERSHIP, PARENTAGE, AND CHILD SUPPORT 1, *available at* http://csed.dc.gov/csed/frames.asp?doc=/csed/lib/csed/pdf/brochures/domestic_partnership.pdf (“A domestic partnership refers to an opposite sex or same-sex couple who registers as domestic partners.”); *Domestic Partnership—FAQ*, NEV. SEC’Y ST., <http://nvsos.gov/index.aspx?page=274#283> (last visited Apr. 27, 2012) (“As a civil contract, Nevada domestic partnerships may be entered into by couples of any sexual orientation as long as they meet the eligibility requirements defined above.”).

263. It is not clear whether municipal and corporate domestic-partnership health-insurance policies will be phased out once a jurisdiction recognizes same-sex marriages or civil unions. I suspect that domestic-partnership programs that provide employer health insurance and other fringe benefits for the benefit of employee partners are much more likely to survive when they apply to both different-sex and same-sex partners.

characterizes the different array of regimes for citizens of Maine and Wisconsin.²⁶⁴ Maryland and Washington have just recognized same-sex marriages, subject to voter referenda in November 2012. Hence, there are at least six (and potentially eight) states and the District of Columbia where lesbian and gay couples have all the regime options that straight couples have.

3. Covenant Marriage

Defenders of traditional-marriage limitations have expended most of their political energy opposing gay marriage, perhaps partly as a matter of penance for not speaking out more strongly against cohabitation regimes and no-fault divorce, two legal changes that have revolutionized and undermined “traditional” marriage. Traditionalists have not been without an affirmative agenda, however. In Arizona, Arkansas, and Louisiana, traditionalists have persuaded state legislatures to create a new institutional option for particularly committed straight couples—*covenant marriage*.²⁶⁵

Couples opting for covenant marriage are bound by special rules making divorce more difficult.²⁶⁶ Articulated in natural law terms, as a return to God-sanctioned marriage for life, the covenant-marriage movement cashes out its normative vision in a substantially utilitarian fashion through a moderate adjustment in the override rule for divorce. For example, couples opting for covenant marriage in Arkansas can still secure a divorce by going through a counseling process and then asking a court for a decree ending the marriage on one of the statutory grounds, which include adultery, family abuse, and spousal separation without reconciliation for two years.²⁶⁷ The statutory grounds do not include irreconcilable differences.

Rhetorically, the covenant-marriage movement is a challenge to the utilitarian understanding of marriage and family law; however, its legal expression not only operates snugly within the default–override rule framework of the utilitarian understanding but also reveals the social power of that understanding. That is, even fundamentalist leaders do not believe that religious Americans will agree to traditional marriages for which there is no easy exit; instead, they want an override rule that gives them freedom to escape unhappy marriages but retains a process for working out remediable differences. Thus, the override rule

264. See discussion *supra* section II.C.2.c.

265. See STEVEN L. NOCK, LAURA ANN SANCHEZ & JAMES D. WRIGHT, COVENANT MARRIAGE: THE MOVEMENT TO RECLAIM TRADITION IN AMERICA 1–4 (2008); Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 946–47, 971 (1998).

266. See Margaret F. Brinig & Steven L. Nock, *Covenant and Contract*, 12 REGENT U. L. REV. 9, 10–11 (1999) (providing a detailed account of the ways that covenant marriages are harder to exit than ordinary marriages in no-fault divorce jurisdictions).

267. Arkansas Covenant Marriage Act of 2001, 2001 Ark. Laws Act 1486 (codified at ARK. CODE ANN. § 9-11-801-08 (2011)); see also ARIZ. REV. STAT. ANN. § 25-901 (2011); LA. REV. STAT. ANN. §§ 9:272–75, 9:307–09 (2011).

for divorce in covenant marriages is tougher than the override rule for no-fault divorce in regular marriages, but it is no return to the fault-based regime of 1911. Surprisingly, even this watered-down version of the natural law understanding of marriage has not caught on in jurisdictions that are havens for traditional family values: tiny percentages (one to two percent) of marriages in Louisiana, and probably Arkansas and Arizona too, are covenant marriages, and the idea has been soundly rejected in other southern states that heartily endorse “traditional” marriage as a reason to exclude lesbian and gay couples from the institution.²⁶⁸ On the other hand, couples who are involved in covenant marriages have fifty-five percent the divorce rate as other married couples, possibly the result of selection effects but still an impressive difference.²⁶⁹

In Arkansas, Arizona, and Louisiana, therefore, romantic different-sex couples have access to three regulatory-regime options from which to choose: cohabitation, marriage, and covenant marriage. What is available for lesbian and gay couples? Very little. In Arizona, lesbian and gay couples, like straight couples, can register as domestic partners in Phoenix and Tucson, but registration carries with it only hospital-visitation rights, as state and municipal employers in that state do not provide benefits to domestic partners.²⁷⁰ In Arkansas, lesbian and gay couples (like straight couples) can only register in tiny Eureka Springs, with a population of only a few thousand persons.²⁷¹ In Louisiana, lesbian and gay couples, like straight couples, can register as domestic partners in New Orleans if one partner is a municipal employee.²⁷²

Arkansas, Arizona, and Louisiana are today highly exceptional jurisdictions. In most of America, long-excluded lesbian and gay couples enjoy state recognition—and state regulation—of their partnerships, unions, and, increasingly, marriages. Access to civil marriage is now broader than ever before in American history—but so are access to and ease of divorce, as well as access to other civil regimes for regulating nonmarital families of choice. Ironically, the utilitarian guideline for our country’s family law pluralism has generated a menu of regimes that has not only shattered the monopoly civil marriage long enjoyed but has also created a legal structure that threatens to undermine marriage itself.

268. See NOCK ET AL., *supra* note 265, at 43 (most people in the covenant-marriage jurisdictions do not even know about the option); Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its as Yet Unfulfilled Promise*, 65 LA. L. REV. 605 (2005) (providing a pessimistic assessment of the Louisiana law).

269. See NOCK ET AL., *supra* note 265, at 117.

270. See Judy Hedding, *Domestic Partner Registry: Arizona Cities Establish Domestic Partner Registry*, ABOUT.COM, <http://phoenix.about.com/od/gay/qt/domesticpartner.htm> (last visited Mar. 23, 2012).

271. See Ed Vitagliano, *Eureka! Exclaim Gay Activists*, AM. FAM. ASS’N J. (Oct. 2007), <http://www.afajournal.org/1007eureka.asp>.

272. See *City and County Domestic Partner Registries*, *supra* note 239 (describing the New Orleans partnership registry).

Consider Table 1 below, which reflects the menu of regimes offered in each state and the District of Columbia as of June 2012. The trend is not only that more regimes are being offered over time but also that more regimes are being offered to same-sex as well as different-sex couples. My prediction is that the regimes will continue to proliferate and that many more will be offered on equal terms to lesbian and gay couples in the next decade.

**Table 1. State-by-State Family Law Menus, January 2012
(Repealed Status in Parentheses)**

Jurisdiction	Domestic Partner Employee Benefits	Reciprocal Beneficiaries	Cohabitation (Different Sex Only*)	Civil Unions (Same Sex Only*)	Marriage (Different Sex Only*)	Covenant Marriage (Different Sex Only*)
Alabama			X*		X*	
Alaska	X		X*		X*	
Arizona			X*		X*	X*
Arkansas			X*		X*	X*
California	X		X	X*	X* (X)	
Colorado	X	X	X		X*	
Connecticut	X		X	(X*)	X	
Delaware	X		X	X*	X*	
District of Columbia	X		X	X	X	
Florida	X		X		X*	
Georgia	X		X		X*	
Hawaii	X	X	X	X	X*	
Idaho			X*		X*	
Illinois	X		X	X	X*	
Indiana	X		X*		X*	
Iowa	X		X		X*	
Kansas	X		X*		X*	
Kentucky	X		X*		X*	
Louisiana	X		X*		X*	X*
Massachusetts	X		X		X	
Maine	X	X	X		X* (X)	
Maryland	X	X	X		X	
Michigan	X		X		X*	
Minnesota	X		X		X*	
Mississippi	X		X*		X*	
Missouri	X		X		X*	

**Table 1. State-by-State Family Law Menus, January 2012
(Repealed Status in Parentheses) (Continued)**

Jurisdiction	Domestic Partner Employee Benefits	Reciprocal Beneficiaries	Cohabitation (Different Sex Only*)	Civil Unions (Same Sex Only*)	Marriage (Different Sex Only*)	Covenant Marriage (Different Sex Only*)
Montana	X		X*		X*	
Nebraska			X*		X*	
Nevada	X		X	X	X*	
New Hampshire	X		X	(X*)	X	
New Jersey	X		X	X*	X*	
New Mexico	X		X		X*	
New Mexico	X		X		X*	
New York	X		X		X	
North Carolina	X		X*		X*	
North Dakota			X*		X*	
Ohio	X		X*		X*	
Oklahoma			X*		X*	
Oregon	X		X	X*	X*	
Pennsylvania	X		X*		X*	
Rhode Island	X		X	X*	X*	
South Carolina			X*		X*	
South Dakota			X*		X*	
Tennessee	X		X*		X*	
Texas	X		X		X*	
Utah	X		X*		X*	
Vermont	X	X	X	(X*)	X	
Virginia	X		X		X*	
Washington	X		X	X*	X	
West Virginia			X*		X*	
Wisconsin	X	X	X		X*	
Wyoming			X*		X*	

Source: ESKRIDGE & HUNTER, *supra* note 8, at 1139–41, app. 6–7 (3d ed. 2011).

III. MENUS, DEFAULT RULES, AND OVERRIDE RULES: LESSONS FOR MARRIAGE EQUALITY AND THE FUTURE OF OUR PLURALIST FAMILY LAW

The public discourse regarding American family law is now—and has long been—predominantly utilitarian in its normative goals and justifications. Even proponents of traditional family values defend their proposals in public forums

primarily in terms of facilitating the best legal structure for nurturing couples who are happy and fulfilled and for rearing children in a healthy productive environment.²⁷³ While there is now a rough consensus in our country that family law ought to create structures that positively contribute to individual happiness and flourishing, there is not a consensus as to precisely what mix of legal rules and institutions optimize happiness and flourishing. An important issue is whether marriage provides unique advantages that cannot be replicated by other institutional forms, from a utilitarian perspective.

One reason for our lack of policy consensus is that we do not agree about what makes us happy. Utilitarian variables are protean and plastic: one can identify a wide array of utilitarian values and construct a wide array of surveys to measure success. One might ask people if they are happy and what would make them happier. Or what makes them fulfilled. One can focus on material or economic success. One can focus on health. All of these are plausible ways to think about our happiness—and all are subject to debate about how they should be counted and measured. Another reason for policy disagreement is that it is hard to ascertain a causal link between institutional structure and happiness (however defined). Even if married people are “happier” than nonmarried people, that tells us nothing about whether marriage causes the greater happiness; it might be the case that happier people tend to get married, not that marriage transforms unhappy people into happier ones. Finally, policy dissensus is driven by varying normative precommitments: differently motivated observers will emphasize some utilitarian values more than others and will interpret the same causal data in strikingly different ways. For example, many Americans are influenced by the natural law understanding of family law; in policy discussions, these folks believe that their moral stances are also supported by utilitarian criteria: the marriage that God requires of us is also good for our health.

There is, indeed, a lot of empirical evidence that married persons in the United States are richer, healthier, happier, and more generative than persons who do not marry, including those who cohabit with their romantic partners.²⁷⁴ Natural law believers, often writing as utilitarian social theorists, tend to over-interpret this evidence, which, properly read, is more equivocal about the utility of marriage. The happiness bounce that marriage confers probably owes much to selection effects; that is, richer, better-adjusted people might be more likely to marry than to remain single or to cohabit.²⁷⁵ The evidence also

273. See, e.g., DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 199 (2007); STEVEN L. NOCK, *MARRIAGE IN MEN'S LIVES* (1998); LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 1–12 (2001).

274. E.g., WAITE & GALLAGHER, *supra* note 273; Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53–76 (1995); see also Janice K. Kiecolt-Glaser & Tamara L. Newton, *Marriage and Health: His and Hers*, 127 PSYCHOL. BULL. 472, 472 (2001) (surveying and analyzing the many empirical studies).

275. For a recent effort to test this hypothesis, finding it partially confirmed, see Judith P.M. Soons & Matthijs Kalmijn, *Is Marriage More Than Cohabitation? Well-Being Differences in 30 European Countries*, 71 J. MARRIAGE & FAM. 1141 (2009).

demonstrates that the marriage bonus is sex-asymmetrical: husbands benefit significantly more from it than wives do.²⁷⁶ And there is recent evidence that the marriage bonus owes a lot to social attitudes supporting marriage; in countries where cohabitation is socially accepted and not stigmatized, the marriage bonus is significantly reduced and sometimes disappears.²⁷⁷

Traditionalists are not the only observers who find and interpret utilitarian evidence to confirm their preconceived normative viewpoints. Many feminist critics of natural law baselines celebrate women's expanded choices, including cohabitation, no-fault divorce, and lesbian parenting.²⁷⁸ Yet those critics rarely cite to empirical evidence that expanded choice actually makes women happier or enriches their lives—and the evidence is subject to debate as to these matters. Thus, feminists ought not to ignore the evidence that marriage is correlated with better health and happiness for both wives and husbands and certainly ought to focus on the stronger evidence that children tend to thrive most in stable two-parent households.

Even more startling are the conclusions from a recent study from the National Bureau of Economic Research. From an empirical analysis of data from the United States, Canada, and Europe, Betsey Stevenson and Justin Wolfers conclude that, notwithstanding women's dramatically expanded choices as to relationships and families, the happiness of the average woman has declined both absolutely and relatively (compared to the happiness of the average man) between 1970 and the present.²⁷⁹ Why is that? The authors are not sure—yet as long as this big question remains unanswered, feminist critics of traditional marriage lack a secure utilitarian anchor for their viewpoint.

Thus, Americans of varying belief structures disagree about what family institutions and rules conduce toward the greatest happiness among couples and ensure the best childrearing environments. Their debate, however, has helped clarify the pluralist web of purposes that family law legitimately serves, consistent with utilitarian premises:

- Encouragement of committed relationships, which plausibly enrich the lives of the partners²⁸⁰ and serve the happiness of children reared within the relationships;²⁸¹

276. See generally Joan K. Monin & Margaret S. Clark, *Why Do Men Benefit More from Marriage Than Do Women?*, 65 *SEX ROLES* 320–26 (2011) (surveying literature and speculation about the various causes for this phenomenon).

277. This is the precise finding of two recent comparative empirical studies, namely Aart C. Liefbroer & Edith Dourleijn, *Unmarried Cohabitation and Union Stability: Testing the Role of Diffusion Using Data from 16 European Countries*, 43 *DEMOGRAPHY* 203, 218–19 (2006), and Soons & Kalmijn, *supra* note 275, at 1152–53. This finding is broadly consistent with BRING, *supra* note 172, which argues that a supportive community network is an important cause of relationship stability and longevity.

278. See, e.g., POLIKOFF, *supra* note 14.

279. Betsey Stevenson & Justin Wolfers, *The Paradox of Declining Female Happiness* #1 (Nat'l Bureau of Econ. Research, Working Paper No. 14969, 2011), available at <http://www.nber.org/papers/w14969>.

280. Margaret S. Clark & Joan K. Monin, *Giving and Receiving Communal Responsiveness as Love*, in *THE NEW PSYCHOLOGY OF LOVE* 200–17 (Robert J. Sternberg & Karin Weis eds., 2006).

281. See, e.g., Sara McLanahan, *Father Absence and the Welfare of Children* (MacArthur Working Papers), available at <http://apps.olin.wustl.edu/macarthur/working%20papers/wp-mclanahan2.htm>.

- Efficient decision rules for romantic couples, including off-the-rack default rules for healthcare decision making, guardianship in the case of incapacitation, inheritance in the case of death, and so on;²⁸² and
- Protection for immature or vulnerable persons, including victims of domestic abuse and violence, romantic partners who rely on assurances of commitment and are then harmed when the relationship ends, and children whose lives are affected by decisions parents and other caregivers might make.²⁸³

The vocabulary and concepts presented in this Article do *not* tell us which values family law ought to serve, how to prioritize competing values, or how to predict which rules or institutions will optimize the happiness or flourishing of romantic partners and the children they are raising in their households. These are enduring issues for public discourse, and their resolution will depend on the force of social practice and evolution of public norms. Specifically, neither the mandatory–default–override rule vocabulary nor the notion of a family law menu of different regimes will resolve the same-sex-marriage debate. As a supporter of marriage equality, I believe that the debate will be resolved by the social fact that many serious lesbian and gay couples want to celebrate their commitment to one another and to their children through the same institution—civil marriage—that straight couples have long deployed. But the vocabulary and concepts in this Article contribute nothing to my confidence on this issue.

Nonetheless, the vocabulary and concepts presented here can contribute to a productive understanding and evaluation of our evolving family law. Specifically, the vocabulary and concepts help us to see more clearly the range of potential regulatory options available to pursue any of the three classic purposes of family law, or to pursue all of them. Consider some examples of such a regulatory matching game.

First, this analysis suggests a resetting of the academic and policy agenda of America's family law. American family law has long been more pluralistic than most academics, virtually all policymakers, and all partisans have made it out to be. Our pluralistic family law has long been committed to a guided-choice philosophy that is inexorably dynamic in its institutional consequences. The guided-choice precept, elaborated in this Article, ought to be the death knell for the simplistic thinking that underlies the defense of traditional marriage and the libertarian privatization of marriage slogans that opened this Article. Traditional marriage, replete with mandatory rules reflecting sexual and gender mores, died many decades ago, and what we have now is an updated understanding of

282. See e.g., David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 45 MICH. L. REV. 447 (1996) (providing excellent analysis of the different purposes of family law, including useful decision-making rules).

283. Compare WAITE & GALLAGHER, *supra* note 273, at 4, 124–49 (invoking family law goal of protecting vulnerable children as a reason to support traditional marriage), with POLIKOFF, *supra* note 14, at 84 (invoking family law goal of protecting vulnerable children as a reason to get “beyond marriage”).

marriage as a set of default rules structuring individual choices and subject to override rules of various sorts. No longer is marriage regulated on the basis of mandatory requirements grounded upon the unity of the married couple. Likewise, marriage was privatized decades ago, and contract-based alternatives to marriage have been entrenched for a generation, yet privatization and contractualization of marriage and other family law institutions have not taken Big Brother out of the bedroom and will not, contrary to the aspirations of the Cato Institute.

More fundamentally, the policy debate in family law is no longer just about marriage.²⁸⁴ Ruth Colker is right to say that cohabitation and other new regimes tend to “mimic” marriage.²⁸⁵ While she and other authors insightfully point out that the marriage-equality movement threatens to marginalize many nontraditional relationships, the project of American family law has been more pluralistic than the critics recognize. Cohabitation-regime protections have been increasingly extended to a broad range of intimate (and not just marriage-lite) relationships. Domestic partnership and reciprocal-beneficiary rules suggest a substantially different model for recognition of relationships, including nonromantic ones, that offer security, friendship, and protection for individuals in an isolating but dangerous world. And state rules for caregiving relationships are increasingly detached from the rules governing romantic relationships.

Second, the analysis in this Article ought to clarify the proper debate over governmental rules applicable to lesbian and gay relationships. Whatever your position on governmental treatment of romantic relationships involving LGBT persons, the analysis in this Article enables you to make a better-informed regulatory choice. Thus, if you believe lesbian and gay relationships are nothing but sexual unions that society has no business promoting, you still ought to consider equal treatment for such couples through a reciprocal beneficiary law, such as the ones adopted in Colorado or Hawaii. That is, the efficient decision-making goal of family law is one that is not tightly linked to the traditional procreative goal of marriage. This helps us disaggregate not only different purposes served by family law but also different institutions and the purposes they serve.

Conversely, if you believe that LGBT persons form healthy relationships and rear children capably within those relationships, you ought to support equal treatment for LGBT relationships. As above, you might tailor your support to the particular goal of family law you consider most important. For example, if you consider the most important role of family law to be protecting children and providing a good environment for rearing children, you might deemphasize marriage equality, especially if you do not believe that marriage contributes to

284. *E.g.*, Blumberg, *supra* note 204, at 1266 (emphasizing cohabitation as a new regime option for romantic couples, competing with marriage); David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, a Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1348–49 (2001) (proposing that the state create a new status for “designated friends”).

285. *See* Colker, *supra* note 219.

stable relations between a child and her two adult caregivers. If you consider protection of children to be intimately tied to committed caregiver relationships, you ought to support civil unions or marriage equality.

Note that jurisdictions adopting reciprocal-beneficiary or civil-union laws have strongly tended to move to full marriage equality. This has been the experience in Europe as well as the United States.²⁸⁶ The process by which this works is simple. Resistance to equal treatment for LGBT families often rests upon stereotypes that such persons are intrinsically antifamily; these beliefs are fanned by the partisan charge that gay marriage will cause a further decline in traditional marriage. In fact, LGBT persons form lasting romantic relationships and raise children, with all the joys and problems straight couples have. In my judgment, a gay-anxious individual who personally knows out-of-the-closet lesbian and gay couples, especially those rearing children, is less likely to oppose civil unions or marriage equality than is a gay-anxious individual who does not know any same-sex couples. Each institutional recognition—starting with municipal and corporate domestic-partnership policies, then with state reciprocal beneficiary and cohabitation rules, culminating in recognition of civil unions—brings more couples out of the closet, falsifies campaigns of vilification, and increases positive support for marriage equality.

Third, the foregoing analysis drives home a stark regulatory inconsistency. A central purpose of American family law has been not just the protection of children but also the encouragement of adult interpersonal commitment that creates the best environment within which children can flourish. This has been the best argument supporting marriage, and now civil unions, as the most favored institution in even a pluralistic family law. Protection of the interests of children is an important normative caution against the increasing number of couples who cohabit without marriage, but the tension within our family law pluralism is even deeper. It is conventional wisdom among experts that the advantages for children assuredly derived from marriage are undermined if the parents divorce.²⁸⁷ Hence, the no-fault divorce revolution of 1967 to 1985 is a prochoice move that generates enormous utilitarian costs and, arguably, sounds as the most destructive change in family law, from the perspective of children. (It is certainly a family law development that harms children's interests much more than even the most antigay theorist can imagine for the consequences of marriage equality.)

The more general lesson from this example, and one demanded by the analysis in this Article, is that our pluralistic family law requires tradeoffs; there

286. See generally William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 McGEORGE L. REV. 641 (2000).

287. The leading study demonstrating the ill effects of divorce upon children is JUDITH WALLERSTEIN, JULIA LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000). See also E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* (2002) (similarly critical of the effect of divorce upon the welfare of children but finding the net effects of marriage beneficial for most children).

is no single purpose of family law that always trumps the others, and frequently the different purposes will be in conflict. In particular, the prochoice efficient-decision-making purpose is often at odds with the more paternalistic purposes of encouraging committed relationships and protecting vulnerable persons. Thus, no-fault divorce, a prochoice move toward efficient decision making, undermines the procommitment and child-protective goals of family law. The old state rules penalizing nonmarital children are an example of a procommitment policy that was at odds with the child-protective goal.

Moreover, the precise composition of the menu of regime options reflects a balance of goals. The old marriage-monopoly regime of the early and mid-twentieth century reflected the procommitment goals of family law, often at the expense of efficient decision making (many married couples were deeply unhappy, including gay and lesbian persons impelled to marry unsuspecting straight persons because of social pressure) and sometimes at the expense of children's best interests (especially children born outside of wedlock). The current menu of regimes is one that undermines marriage, which must now compete with other options. But the extent of the conflict depends on how differentiated cohabitation is from marriage; to the extent cohabitation mimics marriage (to use Ruth Colker's terminology), it ought to be a less successful competitor over time. Most obviously, if the state wants to encourage committed relationships as the overwhelming goal of family law, the state ought to adopt a covenant-marriage alternative and endow it with generous incentives or bonuses.

As the remainder of this Article will explore, the menu approach offers simple yet powerful insights that help clarify the ideological debates within family law—especially the marriage-equality debate that pits traditionalists and progressives critical of same-sex marriage against liberals who believe it a constitutional necessity. Consider the recent decision in *Perry v. Brown*,²⁸⁸ where the Ninth Circuit invalidated Proposition 8, a California voters' initiative that revoked the state supreme court's recognition of marriage equality. TFFV groups have defended the initiative as a proper preservation of the traditional family, while liberals and some progressives have assailed it as an irrational, animus-soaked denial of basic equality. The analytical framework of this Article may not resolve the dispute in *Perry*, but it does illuminate certain features of that dispute and the tendentiousness sometimes displayed by opponents of marriage equality.

288. *Perry v. Brown*, 671 F.3d 1052, 1064–95 (9th Cir. 2012). On February 21, 2012, the appellants, proponents of Proposition 8, petitioned the Ninth Circuit for en banc review of the panel's decision. Appellant's Petition for Rehearing En Banc, *Perry*, 671 F.3d 1052 (No. 10-16696), available at http://www.ca9.uscourts.gov/datastore/general/2012/02/21/Petition_for_Rehearing_En_Banc.pdf. The Ninth Circuit denied en banc review on June 5, 2012. A petition for Supreme Court review is expected. See Howard Mintz, *California's Proposition 8 Case Headed to U.S. Supreme Court*, SAN JOSE MERCURY NEWS (June 5, 2012), http://www.mercurynews.com/breaking-news/ci_20786293/proposition-8-case-headed-u-s-supreme-court.

For example, it is notable that all the parties in the case defended or indicted the exclusion of lesbian and gay couples from marriage on the basis of the utilitarian understanding of family law. Represented by sophisticated counsel, the proponents of Proposition 8 understood that the federal judiciary is committed to equal protection doctrine that refuses to admit arguments grounded on pure “morality” to justify denial of rights to LGBT persons and so defended Proposition 8 along utilitarian lines.²⁸⁹ Because Proposition 8 was substantially inspired by the natural law perspective, their arguments rang false and were brushed aside by the Ninth Circuit as makeweights. *Perry* illustrates the extent to which constitutional law doctrine has settled firmly in support of the utilitarian perspective and has contributed to the marginalization of the natural law understanding in public discourse. Within the utilitarian understanding, as proponents surely realize, it is increasingly difficult to defend the exclusion of lesbian and gay couples (one-fifth of whom are rearing children within their households) from civil marriage.

The regulatory vocabulary of this Article suggests, moreover, that both the traditionalists and the liberals and progressives are overinvested in the gay-marriage debate; both “camps” would better serve their own agendas and the public interest if they focused more of their energies on the human realities that ought to concern each group of Americans. Thus, the TFV advocate who believes family law should encourage committed relationships ought to consider the notion that the best strategy is *not* to oppose same-sex marriages but rather is to seek covenant marriages with more benefits, especially for families with children (section A). Progressives, too, ought to ameliorate their opposition to same-sex marriage and seek to strengthen and differentiate more strongly the menu-based alternatives to marriage (section B). In a grand bargain, traditionalists, liberals, and progressives ought to support state legislation that equalizes marriage rights while also formalizing covenant marriage, cohabitation, and reciprocal-beneficiary regimes. The Article will conclude with some broader suggestions for all interested citizens to create greater order and coherence to the emerging menu of family law regimes (section C).

A. TRADITIONAL FAMILY VALUES (COMMITTED RELATIONSHIPS)
AND MENUS, DEFAULTS, AND OVERRIDES

To the extent that its arguments are cast in utilitarian terms, traditionalist opposition to same-sex marriage usually rests upon the assumption that the primary or sole purpose of family law is to encourage committed relationships that might produce children and provide the best conditions for rearing those

289. See Defendants-Intervenors-Appellants’ Opening Brief at 77–78, 98–102, *Perry*, 671 F.3d 1052 (No. 10-16696) [hereinafter Appellant’s Brief, *Perry*], available at http://www.ca9.uscourts.gov/datastore/general/2010/09/22/10-16696_openingbrief.pdf (distinguishing Proposition 8 from the Colorado initiative struck down in *Romer v. Evans*, 517 U.S. 620 (1996), on the ground that Proposition 8 is grounded in utilitarian values, such as the happiness straight couples and their children derive from “traditional marriage,” which they believe “gay marriage” imperils).

children. Traditionalists, including the defenders of Proposition 8 in *Perry*, argue that gay marriage is fundamentally different from the traditional, and optimal, institution of marriage, where a husband and a wife procreate and rear children.²⁹⁰ Because the purpose of marriage is intimately tied to that traditional model, they maintain, same-sex marriage will undermine the institution of marriage generally and will specifically discourage committed relationships and harm the interests of children, who need two different-sex parents.²⁹¹

Supporters of marriage equality, including the critics of Proposition 8 in *Perry*, have responded that jurisdictions recognizing same-sex marriages have seen no decline of marriage as an institution and that children raised in lesbian and gay households have health profiles similar to children raised in straight households.²⁹² More importantly, there is also evidence that state recognition has enriched the lives of many lesbian and gay couples and the children they are raising.²⁹³ Although this is an empirical debate, many opponents of marriage equality will never be persuaded by empirical evidence or by the stories generated by marriage recognition all over the world. Many older Americans are opposed to marriage equality for reasons that are deeply rooted in their self-identification, in stereotypical ways of thinking, or (to be blunt) in prejudice or bigotry.

Yet it appears to me that increasing numbers of traditionalist opponents are bothered by the lack of empirical support for their concerns, and a younger generation of traditionalists is more open to these stories and to the empirical evidence. The vocabulary of menus, defaults, and overrides offers valuable lessons for the open-minded traditionalist and for the undecided traditionalist young person. Indeed, even the most diehard opponent of same-sex marriage

290. Thus, the Proposition 8 defenders' main argument is that "the traditional definition of marriage reflected in Proposition 8 bears at least a rational relationship to the State's vital interest in increasing the likelihood that children will be born and raised in stable family units by the couples who brought them into the world because it provide[s] special recognition and support to those relationships most likely to further that interest." *Id.* at 17–18, 77–78; see also BLANKENHORN, *supra* note 273, at 205–06 (written by Proposition 8 expert witness who makes the same argument).

291. There are other traditionalist arguments against same-sex marriage, e.g., Wardle, *supra* note 11, but the ones in this text are most popular in public discourse and relate best to the purposes of marriage.

292. E.g., Brief of the Commonwealth of Massachusetts in Support of Plaintiffs-Appellees at 2, *Perry*, 671 F.3d 1052 (No. 10-16696) (demonstrating that civil marriage has flourished in Massachusetts in the decade since the state's highest court ruled in favor of marriage equality); ESKRIDGE & SPEDALE, *supra* note 13 (demonstrating similar experience in the early Scandinavian recognition of lesbian and gay partnerships).

293. Reported benefits of marriage to same-sex spouses include increased feelings of commitment to partners, increased feelings of social inclusion, less anxiety about legal problems, and increased health-insurance coverage. See CHRISTOPHER RAMOS, NAOMI G. GOLDBERG & M.V. LEE BADGETT, WILLIAMS INST., THE EFFECTS OF MARRIAGE EQUALITY IN MASSACHUSETTS: A SURVEY OF THE EXPERIENCES AND IMPACT OF MARRIAGE ON SAME-SEX COUPLES 1 (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Ramos-Goldberg-Badgett-MA-Effects-Marriage-Equality-May-2009.pdf>; M.V. Lee Badgett, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*, 67 J. Soc. ISSUES 316, 316 (2011). Surveyed same-sex spouses also reported that as a result of their marriage, their children were "happier and better off," "felt more secure and protected, gained a sense of stability, and saw their families validated by society." RAMOS ET AL., *supra*.

might benefit from an analysis that situates the same-sex marriage debate in the larger narrative of family law in the last hundred years. Because traditionalists form a significant minority of the American population, their concerns are ones that everyone should consider in a deliberative fashion.

1. The Decline of Marriage as the Divorce Override Got Easier and the Menu Expanded

Our society has long valued marriage as an institution entailing lifetime commitments between two persons. This is the core precept of the natural law understanding of family—yet the utilitarian understanding tends to embrace this ideal, on the ground that the long-term interpersonal commitment inherent in marriage offers enormous benefits to the romantic couple, to the children they are expected to raise, and to society as a whole. On the other hand, there is considerable literature claiming that marriage-for-life is not good for everybody and that the marriage bonus accrues mostly to men.²⁹⁴ Set these important arguments aside and assume, with TFV supporters, that committed marriage-for-life is beneficial to the flourishing of the couple, their children, and society.

Anything that would undermine the benefits of committed marriage-for-life is normatively objectionable from such a TFV perspective, and this belief underwrites the opposition to marriage equality for most TFV intellectual and religious leaders. It is also important to understand the historical context for their present concerns. Marriage-for-life has taken a nosedive in the last century. Many fewer Americans marry, their marriages often end in divorce, and increasing numbers of children are being reared in households headed by unmarried adults. Under TFV assumptions, liberalization of marriage law has been a national calamity, and further liberalization, many TFV persons fear, would spell the end of marriage for everyone. This is an argument that has attracted a wide array of political support, including support from such different leaders as Presidents William J. Clinton and George W. Bush.²⁹⁵

As noted above, such a “defense of marriage” objection is strikingly inconsistent with the experience of states and nations that have recognized same-sex marriages. Since 2003, when the Massachusetts Supreme Judicial Court required marriage equality as a constitutional mandate, the marriage rate has edged upwards in that state, at the same that the marriage rate has plummeted

294. See *supra* note 276 and accompanying text.

295. See President's [Bill Clinton's] Statement on DOMA, Sept. 20, 1996, available at <http://www.cs.cmu.edu/afs/cs/user/scotts/ftp/wpaf2mc/clinton.html> (declaring prior to signing DOMA his longstanding opposition to “governmental recognition of same-gender marriages”). Even though denying committed lesbian and gay couples marriage recognition deprives them of more than 1100 federal rights, benefits, and duties, President Clinton insisted that the act does not “discriminat[e]” against gays and lesbians. See *id.* Similarly, President George W. Bush urged adoption of the Federal Marriage Amendment to protect the time-honored institution of one man, one woman marriage. See *Bush Calls for Ban on Same-Sex Marriages*, CNN Pol. (Feb. 25, 2004), http://articles.cnn.com/2004-02-24/politics/elec04.prez.bush.marriage_1_single-state-or-city-marriage-rights-marriage-licenses?_s=PM:ALL POLITICS.

nationwide; in the same period, the Massachusetts divorce rate took a nosedive, while national divorce rates dropped more modestly.²⁹⁶ The Massachusetts experience is the typical one: marriage equality for LGBT persons has not undermined the institution for straight persons. The vocabulary of this Article, however, reveals an even deeper problem with the defense-of-marriage objection.

Consider this. After the Supreme Court liberalized marriage by striking down mandatory rules against different-race marriages in *Loving v. Virginia* in 1967,²⁹⁷ the rates of divorce and children born outside of marriage immediately skyrocketed and continued a steep upward climb for more than a decade.²⁹⁸ Even though *Loving* changed the institution of marriage in a fundamental way for most Americans at the time, and even though different-race married couples enjoyed less social acceptance and therefore higher divorce rates, almost no one today thinks that opening up marriage to romantic couples of different races caused the decline of marriage in the 1970s. Instead, it is likely that changing social mores drove the decline of marriage in the United States (just as they did in Canada, Europe, and elsewhere). With ebbs and flows, the general trend for the last one hundred years has been for romantic couples to value sexual relations increasingly for their utilitarian pleasure values and not for procreation—and that shift in family values surely had more to do with rising divorce rates and nonmarital births than opening up the institution to new interracial couples.

Did the law have no impact on this demographic shift in family formation? The law probably did have an impact, but it was not expansion of the right to marry that had such an impact. Instead, any effect of law on marriage and divorce rates surely came from three other kinds of prochoice legal reforms: removing the mandatory rule against sexual cohabitation, eliminating mandatory rules discriminating against nonmarital children, and easing the override rules for divorce. As explained in Part II, these changes, accommodating the new sexual mores of our population, constituted genuine revolutions in family law, and revolutions that probably contributed, in some hard-to-determine degree, to the perceived decline of lifetime marriages with children among American adults.

Thus, a much more important regulatory event in the narrative of the decline of traditional marriage was Nevada's decision in 1931 to authorize easier divorce and to open its courts to couples from other states. Nevada also allowed

296. These data are assembled and analyzed in Brief Amici Curiae, Professors William N. Eskridge Jr., Rebecca L. Brown, Bruce A. Ackerman, Daniel A. Farber, Kenneth L. Karst, & Andrew Koppelman, in Support of Appellees at 27–30, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696).

297. 388 U.S. 1 (1967).

298. See DiFonzo, *supra* note 5, at 524–25 (discussing census data). See also Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L. Q. 611 (2004) (presenting a history of proposed constitutional amendments to protect marriage against different-race couples); Rose M. Kreider, *Interracial Marriage and Marriage Instability* (Population Assoc. of Am. Mar. 24, 2000), available at <http://www.census.gov/hhes/socdemo/marriage/data/sipp/interracial-instability.pdf> (presenting empirical support for the proposition that different-race marriages are not as lasting as same-race marriages and enjoy a significantly higher divorce rate).

unilateral divorce, where only one spouse petitioned for an end to the marriage, and other states have followed Nevada's lead, which has resulted in escalating divorce rates in the half century from 1931 to 1981.²⁹⁹ More than any other legal development of the last hundred years, no-fault divorce has changed the fundamental nature of marriage—not only undermining the aspiration that marriage is “until death do we part” but also recasting marriage as a choice-based relationship. Perhaps most disturbingly, there was a bait-and-switch feature to no-fault divorce: wives who invested human capital in their marriages under the fault-based regime found that their husbands could exit more easily than anticipated after no-fault divorce and often ended up destitute because their bargaining position had eroded so badly. In short, if law played any role in the nation's rising divorce rates in the 1970s, the culprit is surely the relaxation of override rules allowing easier divorce and not the revocation of mandatory entry rules for different-race and other couples.

At the same time divorce rates were climbing, so were nonmarital birth rates. Did the law play a role in that phenomenon? As far as I can tell from the literature, allowing different-race marriage played no role whatsoever in this phenomenon—though other legal reforms may have, namely, the repeal of mandatory rules that rendered marriage the only legal situs for sexual intercourse and the invalidation of pervasive discriminations against nonmarital children. Once sexual cohabitation became legal, the state was offering romantic couples a short menu of regulatory options—either marriage, with strong fidelity and support duties as well as hundreds of legal benefits and rights, or cohabitation, where each partner enjoyed rights guaranteed by ordinary contract, property, and tort law. The *Marvin* line of cases made this regime explicit, and the Supreme Court decisions sweeping away discriminations against nonmarital children removed a further incentive for romantic couples to get married.

Once romantic couples had a menu of choices, marriage and cohabitation, rather than one choice, marriage, for their sexual partnership, it stands to reason that fewer couples would choose marriage. In the 1970s, committed couples who were planning or expecting their first child were strongly motivated to get married but less motivated than they would have been in the 1960s, when many states discriminated against nonmarital children. The expanded menu of legal regimes for romantic couples and the improved status for nonmarital children did not impose a death sentence on marriage but did ensure that some indetermi-

299. GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 135–44 (1991) (providing an account of Nevada's unilateral no-fault-divorce reform and its contribution to easier divorces for Americans across the country); see Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L REV. L. & ECON. 325 (1998); Jonathan Gruber, *Is Making Divorce Easier Bad for Children? The Long-Run Implications of Unilateral Divorce*, 22 J. LAB. ECON. 799 (2004) (providing empirical evidence for a significant and broad effect of unilateral divorce though not for no-fault divorce standing alone); Justin Wolfers, *Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results*, 96 AM. ECON. REV. 1802 (2006) (providing similar evidence, but with a more-sophisticated empirical foundation).

nate number of couples who would have married under the old marriage-monopoly system would not marry after the 1970s. Hence, marriage rates would be expected to fall and nonmarital birth rates expected to increase. The most plausible legal reason for declining marriage rates, therefore, is not the repeal of mandatory rules against interracial marriage, but is instead the repeal of mandatory rules penalizing sexual cohabitation and nonmarital children and the creation of a menu of legal options for romantic couples.³⁰⁰

The foregoing thought experiment offers the following lessons for the marriage-equality debate, and especially for the TFFV critics of same-sex marriage. First, marriage is not for everyone. Offered a choice of cohabitation with fewer legal benefits than marriage, many couples have chosen not to marry. There is every reason to believe that many of these couples have made choices that are optimal for them. Likewise, some marriages are better off being terminated, as the divorce statistics reveal. Many divorced couples would have been much happier if they had never married. Are children better off being reared in households where their married parents divorce? The jury is out on that issue—especially for those children whose lives are harmed by acrimonious divorce proceedings. From the utilitarian perspective, encouragement of committed relationships is not a goal that government should insist upon for all Americans. This is one reason why even traditionalists do not insist on a return to the marriage-monopoly (natural law) approach of the early twentieth century. By abandoning the natural law framework to satisfy heterosexual preferences for easier divorce and remarriage, however, traditionalists have sacrificed their underlying philosophy and conceded the dominance of the utilitarian framework for family law. This is a fatal concession unless traditionalists can make a better showing that gay marriage will cause harm to society or third parties.

Second, to the extent that traditionalists believe that government should encourage lifetime committed relationships (whether for natural law or utilitarian reasons), devoting political resources to deny lesbian and gay couples marriage rights is deeply misguided. At the very least, traditionalists need to explain why lesbian and gay couples would not benefit from state-encouraged lasting commitments. Moreover, traditionalists sincerely wanting to protect children should focus on strengthening committed relationships among those children's parents and should not disrespect committed relationships among lesbian and gay couples, especially those couples raising children who would theoretically benefit from their parents' marriages. The defense-of-marriage argument invoked by many traditionalists, in response, is deeply unfair: straight couples have insisted upon legal reforms that have met their needs while demonstrably undermining marriage, and it is the worst form of scapegoating for a majority group to use minority rights as the place to draw the line so as to protect an institution the majority has selfishly compromised.

300. Accord Larry L. Bumpass, James A. Sweet & Andrew Cherlin, *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913 (1991).

Third, the history of family law suggests that the government has been a poor decision maker when it has adopted hard mandatory rules excluding relationship choices made by mature, competent adults. To be sure, mandatory rules are useful and sometimes necessary to protect immature or vulnerable persons whose interests might be slighted by selfish or short-sighted parents—but the history of mandatory rules for adult relationships is a history of failure, and the history of openly discriminatory mandatory rules is a national disgrace. Nondiscriminatory default rules work much better here, because they respect the romantic choices of the partners. As every parent knows, or comes to know, neither government nor parents can tell young adults whom they should love.

2. How Traditionalists Have Contributed to the Decline of Marriage

There is an even more striking lesson for traditionalists who are sincere in their support of committed relationships. Assume that TFV persons are right to think that civil recognition of same-sex marriage will further undermine the morally good institution of marriage. Are traditionalists *also* right to believe that gay marriage is such a central threat to traditional marriage that their public law agenda should focus on that issue, to the exclusion of divorce reform, covenant-marriage laws, and other adjustments to the current menu of family-law default-rule regimes? It is hard to believe that marriage equality for same-sex couples is such a central threat—any more than marriage equality for different-race couples was a central threat back in the 1960s.³⁰¹

Consider a deeper way in which menu theory presents new dilemmas for traditionalists opposing marriage equality. That is, their opposition to same-sex marriage has driven an expansion of the menu of regimes for romantic couples—and, ultimately, the creation of institutions competing with marriage and thereby undermining the older institution.³⁰² The political logic of this phenomenon is

301. There are other features that make the race and sexual-orientation parallels even tighter. In the 1950s, many traditionalist persons, inspired by their religious faith, believed that different-race marriage was the same kind of anti-Christian move that today's traditionalists claim for same-sex marriage. See William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct To Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 672–73, 682–83 (2011) (documenting how American fundamentalist religions construed the Word of God to exclude people of color or interracial couples as morally not worthy of belonging to their faith communities); Stein, *supra* note 298 (documenting how many Americans supported constitutional amendments to bar different-race marriages because they did not belong in a God-fearing republic). Compare Wardle, *supra* note 11 (arguing that fundamental institutions such as marriage need to be exclusionary, as “community” is constructed by deciding who does not “belong”).

302. Competing institutions such as civil unions and cohabitation draw some couples away from marriage and so undermine the institution in that respect, but the expanded menu undermines marriage in another way as well. As Peg Brinig suggested to me, economists argue that some of the utilitarian benefits of marriage derive from its *signaling* effect: employers, banks, and other third parties might “trust” a married person more than an unmarried person because marriage signals stability and commitment as well as a better social support system. E.g., Michael J. Trebilcock, *Marriage as a Signal*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 245 (F.H. Buckley ed., 1999). When the state recognizes other relationships as ones entailing commitment, especially civil unions (which are just as hard to exit as marriage) but also perhaps domestic partnerships and cohabitation (easier to exit), it is

simple. Most lesbian and gay couples want legal recognition for their romantic relationships as marriages. Many traditionalists oppose marriage equality, often intensely. For a long time, intense traditionalist opposition killed every single gay-marriage proposal, but the perseverance of committed lesbian and gay couples, many rearing children, has given the gay-marriage movement a Terminator quality: even after repeated defeats in legislatures, state-initiative votes, and even court cases, marriage equality has kept coming back and coming back stronger, as more Americans have been persuaded that gay marriage is a legitimate demand by honorable couples and not an exercise in political correctness to accommodate the selfish "homosexual agenda." Indeed, support for marriage equality, which hovered at just over ten percent in 1988, is now roughly equal to or greater than support for excluding same-sex couples from civil marriage.³⁰³

With increasing demand for legal recognition of lesbian and gay relationships, as well as intense even if declining opposition, legislators and judges in an increasing array of states have found it natural to look for compromises that give LGBT people what they most want, namely, a dignified legal structure for their families, without conferring on these couples what traditionalists most fervently protect, namely, the hallowed institution of marriage. The obvious compromises have been those suggested by the European experience with *registered partnerships*, which provide all the legal rights and benefits of marriage to lesbian and gay couples, and with *pactes civils*, which provide many of the rights and duties of marriage to couples who can dissolve their unions easily.³⁰⁴ In the United States, we have called these options civil unions or domestic partnerships (like registered partnerships) and reciprocal beneficiaries (like *pactes civils*).

In an increasing number of states, the new institutions add to the menu regimes from which both straight and gay couples can choose. Thus, municipal and corporate domestic-partnership policies (granting important employee benefits) are typically offered to straight as well as gay and lesbian cohabiting employees.³⁰⁵ Reciprocal-beneficiary laws of Hawaii and Vermont apply to some straight couples the state views as nonromantic, as well as to romantic

diluting the once-unique signal that marriage offered to third parties. Robert Rowthorn, *Marriage as a Signal*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE* 132 (Antony W. Dnes & Robert Rowthorn eds., 2002).

303. For graphs and trendlines depicting increasing support for marriage equality, see Nate Silver, *Gay Marriage Opponents Now in Minority*, N.Y. TIMES BLOGS (Apr. 20, 2011), <http://fivethirtyeight.blogs.nytimes.com/2011/04/20/gay-marriage-opponents-now-in-minority>, and PEW RESEARCH CTR., TEN YEARS OF CHANGING ATTITUDES ON GAY MARRIAGE (2011), available at <http://features.pewforum.org/gay-marriage-attitudes/index.php>.

304. For an excellent introduction to the variety of European marriage-like and marriage-lite institutions created after 1989, see *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 417-732 (Robert Wintemute & Mads Andenaes eds., 2001) [hereinafter *LEGAL RECOGNITION*].

305. See EMP. BENEFIT RESEARCH INST., *supra* note 241 (finding thirty-two percent of surveyed corporations offered domestic partnership policies to different-sex as well as same-sex partners of

lesbian and gay couples. Nevada and the District of Columbia offer the state-wide domestic-partnership option to all couples.

The expanded menu generated by the marriage-equality debate contributes, theoretically, to the decline of marriage. As we have seen before, the more options romantic couples have for legal recognition of their relationships, the fewer couples will choose marriage. Thus, the couples who marry in part because one partner needs the spousal healthcare benefits afforded by the employer of the other partner will hesitate to marry if they can secure the same benefit by designating a domestic partner to the employer.

The phenomenon outlined above remains modest in the United States, but if the examples of Canada and Europe are any guide, then these new family law regimes will continue to multiply as more states and municipalities feel political and even constitutional pressure to create some kind of legal structure for LGBT families. In France, for example, *pactes civils* are very popular with straight couples, who are substituting such unions for marriage at a rapid clip.³⁰⁶ More broadly, defenders of traditional marriage face a new dilemma now that at least half of Americans support marriage equality: they risk associating religion with prejudice, in the same way that fundamentalist Protestant religions did in the 1950s, when their support for apartheid and antimiscegenation laws was grounded upon interpretations of the Bible that now appear to have been pervasively bigoted. Traditionalists opposed to gay marriage today ought to follow the path taken by antimiscegenation traditionalists in the 1960s and 1970s: abandon hard-line opposition to committed nontraditional unions and focus on other policies that might advance the family-values agenda. Consider, now, a policy focus and strategy that ought to be attractive to TFV Americans.

3. A New Approach to Covenant Marriage for Families with Children

The most thoughtful argument made by TFV supporters is that family law should encourage committed relationships, both because they, assertedly, improve the partners' quality of life and provide the best home for the rearing of children. If this is true, TFV persons really ought to support, rather than oppose, similar rights for LGBT couples. But TFV persons instead invest their energies into opposing gay marriage because that is a symbolic battle they can win in most states; in contrast, the primary legal rules undermining marriage-for-life—legalized cohabitation and unilateral no-fault divorce—are politically difficult to roll back.

From the perspective of the mandatory–default–override approach deployed in this Article, the most logical response for supporters of traditional marriage would be to add a new item to the menu: marriage that is harder to exit. Indeed,

employees); *City and County Domestic Partner Registries*, *supra* note 239 (listing municipal and county domestic-partnership registries).

306. See LEGAL RECOGNITION, *supra* note 304, at 475–492.

this is the idea of the new covenant-marriage regime discussed above. While allowing romantic couples to continue to choose regular marriage, with its no-fault divorce rule, the three covenant-marriage states have created a new institution where the override rule for escaping the marriage-for-life default is somewhat tougher. Unfortunately, even traditionalists are not buying this promising idea. Few couples have opted into the covenant-marriage regime in the states offering it, and traditionalists scoff at covenant-marriage bills proposed in other southern states.³⁰⁷ This phenomenon reveals the profound limits of family law to channel couples into institutional formats that deprive them of future choices, even in the relatively minor way that covenant marriage does. (Existing covenant marriage regimes do not return to the fault-based override rules prevailing before the 1960s but instead require more deliberation and longer waiting periods before the couple can divorce.)

The menu approach suggests another angle for this regulatory experiment. The available evidence supports the TFV concern that divorce often imposes significant costs on children.³⁰⁸ Who can disagree with the normative point that family law should protect children, usually the most vulnerable persons in the family, against the costs of potentially selfish decision making by their married parents? So covenant marriage should make it harder to divorce than current regimes do, and the legislature should create additional protections for children. In light of this policy goal, traditionalists ought to consider supporting a new kind of rule for overriding the marriage-for-life default: when a romantic couple gets married, they enjoy the (now normal) no-fault override rule—until they have or adopt a child, in which case the override rule becomes more stringent (along the lines laid out in covenant-marriage laws). In other words, having a child legally transforms the ordinary marriage into a covenant marriage that is harder to terminate.³⁰⁹ Perhaps when the children all reach the age of majority, the override rule might fall back to no-fault divorce upon the assumption that the children are less vulnerable to parental break-up at that point.

To be sure, this option might also be a hard sell politically and might in practice deter some romantic couples from marrying. To make covenant mar-

307. See NOCK ET AL., *supra* note 265, at 43 (reporting low rates of knowledge of and registration for covenant marriages in the jurisdictions that have them); BIRMINGHAM NEWS, *Some Alabama Lawmakers May Think 'Covenant Marriage' a Good Idea but Not Many Commenters*, AL.COM (Mar. 19, 2012, 2:28 PM), http://blog.al.com/spotnews/2012/03/some_alabama_lawmakers_may_thi.html (reporting skepticism about a covenant marriage bill in Baptist Alabama, with bloggers feasting on the idea like famished dieters).

308. E.g., WALLERSTEIN ET AL., *supra* note 287 (presenting a leading empirical study of the high costs of parental divorce on children); Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26 (1991).

309. Ian Ayres and Peg Brinig suggested this idea to me. Tennessee and Virginia impose longer waiting periods for married couples seeking divorce when there are minor children in the households. See TENN. CODE § 36-4-101; VA. CODE § 20-91. California's domestic-partnership law for lesbian and gay couples makes it much easier for those couples to divorce if they are partnered for less than five years and are rearing no children in the partnership household (as well as meeting various other conditions). See CAL. FAM. CODE § 299(a) (Deering 2006), added by 2003 Cal. Stats., ch. 421, § 8.

riages more attractive to romantic couples, a better proposal might be to sweeten covenant-marriage laws with one or two big legal benefits not available to regular married couples. Given the child-protective rationale, the most obvious benefit that might be added would be a significantly larger tax deduction for each child in a covenant marriage. Thus, if state law (and federal law if Congress went along) afforded married or cohabiting parents a \$2000 deduction from gross income for each dependent child, the state might as a matter of policy afford parents in a covenant marriage a \$10,000 deduction for each dependent child. This would not only make the covenant-marriage regime more attractive but would also tie the bonus to the main rationale for covenant marriage—protecting the interests of children reared within the relationship.

Although it is uncertain whether this or other added legal benefits would induce large numbers of romantic couples to opt for covenant marriages, this is precisely the sort of policy TFV persons and associations ought to be studying and advocating, rather than opposing marriage equality. Now that romantic couples enjoy a menu of relationship choices, traditionalists must ask themselves: Why should romantic couples opt for covenant marriages that are harder to exit? Opposition to same-sex marriage does not contribute to such a normative project and, if anything, will undermine it if the state creates yet another menu regime competing with marriage. The best strategy for traditionalists is not one grounded upon prohibitory rules at all—but instead one grounded upon positive incentives.

Indeed, I would suggest that the time has come for sincere supporters of marriage equality and sincere traditionalist opponents to reach a grand compromise in a state that has not recognized same-sex marriages. In return for liberal and progressive support for a covenant-marriage regime with extra child-based regulatory benefits, conservatives and traditionalists ought to agree to marriage equality. If something like this grand compromise could be achieved in just one state, its success could be a model for other states as well.

B. PROGRESSIVE FEMINIST VALUES (WOMEN'S RELATIONAL FLOURISHING) AND MENUS, DEFAULTS, AND OVERRIDES

Many progressives have the opposite problem with the marriage-equality movement than most traditionalists have: the latter object to *homosexual* couples entering the institution of marriage, whereas the former object to LGBT persons and feminists seeking to enter the institution of *marriage*. The progressive objection, voiced most articulately by feminist thinkers such as Paula Ettelbrick and Nancy Polikoff, is that marriage is a patriarchal institution with a poor history of treatment for women, sexual minorities, and the poor. Why should lesbian and gay couples want to inhabit such an institution?³¹⁰ More broadly,

310. For examples of progressive-feminist or lesbian-feminist critiques of marriage and of the marriage-equality movement, see RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992); Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 *DIFFERENCES* 14 (2002);

progressives maintain that family law reform should not focus on extending marriage rights to more couples but rather should focus on reconfiguring family law so that more “families” (understood broadly to include caregivers, friends, and cohabitants) are provided governmental benefits and protections traditionally afforded only married spouses. This broader agenda is articulated in the *Beyond Same-Sex Marriage* website and movement.³¹¹

To be sure, progressives generally believe that lesbian and gay couples ought to have the same legal options that straight couples have, and thus many progressives do not absolutely oppose marriage equality. Instead, they oppose efforts to make marriage equality such a priority of the LGBT rights movement, when other problems are just as important or more important to American families, broadly understood.³¹² Consistent with the theme of this Article, these critics correctly understand that both legal options and legal prohibitions are regulatory. So long as the state channels citizens into marriage by providing special legal-benefits rights only (or primarily) to married couples, the state is regulating and penalizing persons and couples who form important relationships outside of marriage. By normalizing gay marriage, the state is further marginalizing single gay persons, unmarried cohabiting couples, and open relationships, including those of married lesbian and gay couples.³¹³

Supporters of same-sex marriage respond that marriage equality ought also be understood as normalizing gays.³¹⁴ The normative struggle for marriage equality has a potentially large payoff for all sexual minorities because it promises to undermine homophobia. A central theme of antihomosexual animus is the stereotype of the gay or lesbian person as selfish and hedonistic; homosexual relationships are denigrated as sterile and sad.³¹⁵ Marriage equality undermines these narratives, for it reveals how LGBT people form meaningful relationships and, increasingly, raise children within those relationships. LGBT

Claudia Card, *Against Marriage and Motherhood*, HYPATIA, Summer 1996, at 1; Colker, *supra* note 219; Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9; Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535 (1993).

311. *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006), http://www.beyondmarriage.org/full_statement.html [hereinafter *Beyond Same-Sex Marriage*].

312. This is the main point made in *Beyond Same-Sex Marriage*: “Marriage is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others. While we honor those for whom marriage is the most meaningful personal—for some, also a deeply spiritual—choice, we believe that many other kinds of kinship relationship, households, and families must also be accorded recognition.” *Id.*

313. *E.g.*, Ettelbrick, *supra* note 310; Polikoff, *supra* note 310; *Beyond Same-Sex Marriage*, *supra* note 311.

314. *E.g.*, CHESHIRE CALHOUN, FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT 107–15 (2000); ESKRIDGE, *supra* note 23, at 197–230.

315. Angela Simon, *The Relationship Between Stereotypes of and Attitudes Toward Lesbians and Gays*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 62, 62–63 (Gregory M. Herek ed., 1998); Gregory M. Herek, *Sexual Prejudice*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 441, 448–51 (Todd D. Nelson ed., 2009).

couples with children constitute a performative counternarrative to antigay stereotyping, as they demonstrate the reality of LGBT families.³¹⁶ Many progressives remain unpersuaded by this line of argument, insisting that the payoff for undermining these traditional stereotypes will be concentrated in the hands of “respectable” married “homosexuals,” and not “queers” and nontraditional families.³¹⁷ The vocabulary of menus, defaults, and overrides deployed in this Article provides a useful way for progressives to approach this issue.

1. Ameliorating the Progressive Critique of Marriage

Some progressive critics of marriage equality object that marriage is a patriarchal institution saturated with deep and pervasive historic discriminations against women, persons of color, and LGBT persons.³¹⁸ A central mistake of this particular critique is its tendency to treat marriage as a static institution—when in fact it is highly mobile, having changed dramatically in the last century and even more in the new millennium.³¹⁹ The decline of mandatory rules and the new guided-choice regime have created a new institution still called marriage but a very different institution from the one that some progressive critics fixate upon. (Ironically, of course, when opponents of marriage equality claim they are defending “traditional marriage,” they are invoking an equally dynamic concept—they are *not* defending marriage as it existed in 1911 or even as it existed in 1961. For leading defenders of marriage such as Bill Clinton in the 1990s and George Bush in the 2000s, “traditional marriage” is post *Loving*, post no-fault divorce, and post adultery decriminalization.)

For a demonstration of the normative as well as legal mobility of marriage, consider this example invoked by lesbian-feminist critics. During Reconstruction and through most of the twentieth century, marriage was a thoroughly racist institution, utilized by some to discipline cohabiting black couples while at the same time segregated by law to preserve the integrity and supremacy of the “white race.”³²⁰ This is a morally squalid history—but does that squalid history mean that marriage remains a racist institution today? Indeed, is it not possible that interracial marriages (now 7.5% of all marriages) are one way that our society can undermine racism, by removing the hard racial lines of the past and literally integrating family networks?

316. See Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 265–66 (1998).

317. E.g., Ettelbrick, *supra* note 310.

318. See generally *Beyond Same-Sex Marriage*, *supra* note 311 (objecting to campaigns of “conservative . . . coercive, patriarchal marriage promotion”); Ettelbrick, *supra* note 310.

319. On the constant evolution of marriage, the standard source (and a book worth reading) is COTT, *supra* note 26.

320. See *Loving v. Virginia*, 388 U.S. 1 (1967) (reporting lower court opinions that affirmed the “white supremacy” assumption of southern antimiscegenation laws); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999) (reporting the deployment of marriage law by racist southern governments to discipline cohabiting blacks).

Vicki Schultz and Michael Yarbrough respond that western marriage is intrinsically and deeply patriarchal in ways that it never was intrinsically racist.³²¹ As a cultural institution, marriage is gendered and is associated with a division of labor (with women still doing most of the housework) that reinforces the sexist trope of working husband and caregiving wife. As a legal institution, civil marriage subsidizes spouses who stay at home and raise children. Whether it comes from social gender stereotyping or legal rules, Schultz and Yarbrough argue that marriage channels people's energies into specialized and nonegalitarian roles within the home.³²² I am more doubtful. As Nan Hunter and Mary Coombs have argued, the introduction of same-sex couples and transgender persons into the institution is a potentially powerful force for de-gendering marriage and, with it, American society.³²³ So long as civil marriage is limited to one man and one woman, the institution rests upon the sexist assumption that love, romance, and family for any woman require the inseminating presence of a man. Once marriage is opened up to two women, this central institution of our legal culture becomes a testament to the antisexist notion that a woman can find love, romance, and family with another woman. This is potentially quite liberating—and synergistic.³²⁴ Evidence from couples who entered into civil unions in Vermont during the first decade of the new millennium indicate that lesbian and gay couples who joined in the institutional equivalent of marriage revealed the same nongendered practices of household management that other scholars have found for nonmarried LGBT families.³²⁵ Given the short time span and nonrandom sampling virtually inevitable in any study of LGBT families, these conclusions are preliminary and tentative—but there are no studies suggesting otherwise at this point.

Like most traditionalist critics of marriage equality, many progressive critics

321. Vicki Schultz & Michael Yarbrough, Will Marriage Make Gay and Lesbian Couples Less Egalitarian? A Cautionary Tale 14–16, 21–42 (Apr. 15, 2011) (unpublished manuscript) (on file with author).

322. *Id.*

323. Coombs, *supra* note 316, at 266; Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY* 9, 16–19 (1991).

324. Thus, progressive critics of marriage equality seem to assume that the LGBT rights agenda involves a zero-sum game: working for marriage equality means fewer resources for campaigns against, for example, sexual violence. That is wrong. The marriage-equality movement, for example, helped pave the way for decriminalization of consensual sodomy, both by raising public consciousness about lesbian and gay families and by pressing traditionalists to prove that their opposition to gay marriage did not arise out of antigay bigotry. See Eskridge, *supra* note 33.

325. See Sondra E. Solomon et al., *Pioneers in Partnership: Lesbian and Gay Male Couples in Civil Unions Compared with Those Not in Civil Unions and Married Heterosexual Siblings*, 18 *J. FAM. PSYCHOL.* 275, 282 (2004); Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 *SEX ROLES* 561, 567–68, 570 (2005); see also Robert-Jay Green, *Risk and Resilience in Lesbian and Gay Couples: Comment on Solomon, Rothblum, and Balsam*, 18 *J. FAM. PSYCHOL.* 290 (2004) (commenting on Solomon et al., *supra*); Charlotte J. Patterson, *What Difference Does a Civil Union Make? Changing Public Policies and the Experiences of Same-Sex Couples: Comment on Solomon, Rothblum, and Balsam*, 18 *J. FAM. PSYCHOL.* 287 (2004) (same).

have misplaced their own energies. If their concern is to protect marginalized persons and couples who do not want to marry or who value their sexual freedom, the progressive agenda ought to focus on the content of the emerging family law menu of regimes.³²⁶ For example, at the same time LGBT groups have been pressing their case for same-sex marriage, judges and law professors have been pressing for increased legal regulation of cohabitation.³²⁷ I should submit that the latter, making the cohabitation regime more like the marriage regime, represents a much bigger challenge to the sexual freedom of unmarried couples than marriage equality does. An even more exciting opportunity for progressive critics of marriage is presented by the expanding menu, which I now consider.

2. Progressive Opportunities Within the Expanding Menu of Relationship Options

Recall the ways in which the same-sex marriage debate has created a larger context in which the family law menu of relationship regimes has been expanding. Progressives should take advantage of these opportunities to press for alternatives to marriage that they consider to be good. This was the original concept of domestic partnerships: progressive activists in San Francisco created a new, secular institution for municipal recognition of lesbian and gay partnerships. Because recognition of such relationships was, early on, possible only at the municipal level, domestic partnerships carried few legal rights. An exception has been the District of Columbia, whose 1992 domestic-partnership law provided only employment benefits for partners.³²⁸ But subsequent amendments expanded the range of benefits afforded domestic partners—until the 2006 and 2008 amendments conferred on domestic partners almost all the rights, benefits, and duties of spouses.³²⁹ Notably, different-sex as well as same-sex couples can register in the District.

Consistent with the District of Columbia's experience, Robin West has argued that the new institution of civil unions provides a robust alternative to marriage

326. Thus, *Beyond Same-Sex Marriage*, *supra* note 311, says much about how America's family pluralism ought to be reflected in a more pluralistic family law but says virtually nothing about the new institutions (discussed in this Article) that have been implemented in the last thirty years to fill part of that need. Moreover, the statement seems unaware that the same-sex marriage movement has actually resulted in the creation of several experimental institutions, such as reciprocal and designated beneficiaries, that address the precise problems the statement identifies.

327. *Beyond Same-Sex Marriage*, *supra* note 311, does not discuss the tremendously important issues surrounding the law of cohabitation—including the increasing numbers of legal benefits that are accorded cohabiting couples in many jurisdictions (a trend the statement ought to find useful) as well as the tendency in some states to impose marriage-like duties onto cohabiting partners (a trend the statement might find more problematic).

328. Health Care Benefits Expansion Act of 1992, 1992 D.C. Law 9-114.

329. Domestic Partner Equality Amendment Act of 2006, 2006 D.C. Legis. Serv. 16-79 (West); Omnibus Domestic Partner Equality Amendment Act of 2008, 2008 D.C. Legis. Serv. 17-231 (West).

without the patriarchal baggage of that institution.³³⁰ The virtue of Professor West's proposal, from a progressive perspective, is that it delinks the state's institutional support for committed couples from the religion-saturated institution of marriage. Everyone—straight couples, lesbian and gay couples, and couples including transgender persons—would have access to the same civil institution that values interpersonal commitment but without the linkage to the sacramental religious institution of God-blessed marriage. Politically, the proposal might be especially attractive if it were combined with the preservation of marriage as a civil institution, perhaps one that is much harder to exit than it is now (so something more like covenant marriage rather than today's marriage with unilateral no-fault divorce as an easy exit route).

Another possible focus for progressive reform is the institution of reciprocal or designated beneficiaries, along the lines set by Hawaii in 1997 and Colorado in 2009.³³¹ Unlike civil unions and marriage, the reciprocal or designated-beneficiary institution does not entail a hard-to-exit lifetime commitment; ending a reciprocal or designated-beneficiary relationship is as easy as filling out a form. This arrangement is less likely than cohabitation to entail complicated property-division and support obligations upon the couple's separation. The institution also does not carry with it fidelity rights and duties—but does provide beneficiaries with much of the social-safety-net and decision-making rules that marriage law provides. Many couples may care for their partners and consider them to be the best decision makers in bad times but may not desire the support obligations or sexual fidelity of marriage. For these couples who are happy to forego the benefits of marriage, progressives might want to press for something like the reciprocal-beneficiary institution in states beyond Hawaii, Vermont, and Colorado.

Some progressives believe that these new institutions, these new items on the menu of relationship regimes, will be swallowed up by the marriage-equality movement. In other words, once same-sex marriages are recognized, the earlier established institutions will be revoked. In states now recognizing same-sex marriages, some employers no longer recognize domestic partnerships and now demand a marriage license for a partner to qualify for healthcare insurance and other employee benefits.³³² When the Vermont and New Hampshire legislatures enacted same-sex-marriage statutes, they converted then-existing civil unions and domestic partnerships, respectively, into marriages and abrogated those

330. ROBIN WEST, *MARRIAGE, SEXUALITY, AND GENDER* (2007). Compare Professor Solomon's articles, *supra* note 325, providing an empirical snapshot of Vermont's experience with civil unions. See sources cited *supra* note 310.

331. See *supra* section II.C.2.b.

332. For example, Yale University, where I teach, abandoned its domestic-partnership benefits program when Connecticut recognized civil unions and then same-sex marriages. See Tara Siegel Bernard, *Yale and Columbia Reimburse Gay Employees for Extra Taxes*, N.Y. TIMES BUCKS BLOG (Dec. 20, 2011), <http://bucks.blogs.nytimes.com/2011/12/20/yale-and-columbia-reimburse-gay-employees-for-extra-taxes/>.

alternate family law regimes.³³³

Yet this scenario is far from inevitable; it is a political choice made by elected legislators. This choice reflects the reality that citizens in most states agree with traditionalists that the state should be encouraging (but not requiring) romantic couples to enter into long-term committed relationships—and do not agree with progressives who criticize marriage. Yet the erasure scenario is far from inevitable, for earlier adopted regimes for state recognition often survive marriage equality—especially when the earlier regimes are available to different-sex as well as same-sex couples. The best example of this phenomenon is employer or municipal recognition of different-sex as well as same-sex domestic partners for purposes of employee benefits, including health insurance, family leave, and so forth. When these benefits are available to all domestic partners, and not just lesbian and gay partners, marriage equality has usually not impelled these employers and municipalities to revoke such benefits.³³⁴ Other examples of this phenomenon include registered partnerships in The Netherlands, common law spouses in Canada, domestic partnerships in the District of Columbia, and reciprocal beneficiaries in Hawaii—all of which survived the enactment of new statutes recognizing same-sex marriages (or, in the case of Hawaii, civil unions).³³⁵

More broadly stated, the marriage-equality movement gives progressives *the* golden opportunity they need to advance their own positive proposals for family law reform because the door is open to legislative consideration of new institutions at the same time policymakers are seeking compromises between marriage-equality groups and opposing (mostly traditional-family-values) groups.

3. Family Equality: New Default and Override Rules for Parent–Child Relationships

The challenge for progressives is to rethink the menu of relationship regimes. Some ideas flow from the progressive critique that the state gives far too much emphasis and encouragement to marriage. (This objection would be more powerful if progressives backed it up with the kind of empirical analysis scholars have devoted to the proposition that marriage secures utilitarian advan-

333. N.H. REV. STAT. ANN. § 457.46 (2012) (marriage-equality statute, transforming civil unions into marriages); 2009 VT. STAT., S.B. 115, § 12(b) (marriage-equality statute, repealing the 2000 civil-unions law).

334. See *supra* section II.c.2.a.

335. See LEGAL RECOGNITION, *supra* note 304, at 211–78 (discussing Canada); *id.* at 437–64 (discussing The Netherlands); D.C. OFFICE OF GAY, LESBIAN, BISEXUAL AND TRANSGENDER AFFAIRS, *Marriage and Domestic Partnership Information*, <http://dc.gov/DC/GLBT/Resources+and+Publications/Marriage+and+Domestic+Partnership> (last visited May 21, 2012) (describing the rights same-sex couples now have to marry or to register as domestic partners in the District); 2011 Haw. Sess. Laws Act 1 (S.B. 232) (leaving the state reciprocal-beneficiaries law intact but providing that reciprocal beneficiaries could not secure a civil union until they had terminated their reciprocal-beneficiary status); HAWAII DEP'T OF HEALTH, *About Reciprocal Beneficiary Relationships*, <http://hawaii.gov/health/vital-records/vital-records/reciprocal/index.html> (last visited May 21, 2012) (describing rights reciprocal beneficiaries continue to have under Hawaii law).

tages for romantic couples and their children.) Thus, progressives might urge the creation of alternative institutions, like civil unions and reciprocal beneficiaries, and reconsideration of the many extralegal benefits the law accords married couples. A primary progressive focus would then be federal law, which rewards married couples in many ways, as the Defense of Marriage Act litigations are now illustrating. This kind of progressive agenda faces an uphill battle, for most Americans agree with the traditionalist position that the state ought to encourage committed relationships, especially when there are children in households. But, in a democracy, progressives ought not to complain too loudly that the government is not recognizing the “right” institutions simply because most citizens and voters reject progressive ideas and proposals.

Another progressive option offers more exciting possibilities for alliances with traditionalists who focus on the welfare of children. Exemplified by Martha Fineman, many feminist theorists argue that family law reform should deemphasize the menu of options for horizontal (romantic) relationships and give more attention to the menu of options for vertical (caregiving) relationships.³³⁶ Much feminist work thus far has been devoted to providing more resources to such relationships—for example, along family-medical-leave lines.³³⁷ Complementing such work is a newer focus on rethinking the traditional mandatory rules about parent–child relationships.

Founded upon the natural law understanding, the traditional rules were that children born within marriage were conclusively presumed to be the progeny of the married couple, whereas children born outside of marriage were “bastards” with at most one parent (the birth mother) and a host of discriminations against them.³³⁸ These mandatory rules have been abandoned or softened everywhere in the country. Thus, the traditional presumption of the husband’s paternity for children born within the marriage has been largely replaced with a default rule that can be overridden. Another mandatory rule that is in the process of abandonment is the exclusion of same-sex parents from joint parenting of children; this mandatory rule has been revoked in as many as half the states, and the traditional default rule has been relaxed with override rules that protect the “best interests” of children.³³⁹

The basis for these new default-with-override rules has been the same utilitarian understanding that has revolutionized other areas of family law and

336. See FINEMAN, *supra* note 16.

337. See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 229, 237 (2000).

338. Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 2 STAN. J. C.R. & C.L. 201, 208–10 (2009).

339. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); see also Eleanor Michael, Comment, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the “Best Interests of the Same-Sex Family,”* 36 CONN. L. REV. 1439, 1447 (2004) (“Courts have permitted same-sex couples to adopt children in all but a few states by using [a] ‘best interests of the child’ standard.”).

given the field its current pluralistic texture. Thus, marriage and blood, the traditional bases for parental rights, have been supplemented, and sometimes have been replaced, by functional defaults. Those defaults, in turn, are informed by attachment theory, the notion that children benefit from continued nurturing by early caregivers.

The energy devoted to marriage equality ought to be matched, or perhaps now exceeded, by energy devoted to family equality, where lesbian and gay partners can rear children on the same terms as straight partners. This has been a project long advocated by Nancy Polikoff.³⁴⁰ The vocabulary and concepts of this Article contribute to a deeper appreciation of Professor Polikoff's agenda. When children are born into a marital household, the married spouses are presumed to be the legal parents of those children. That presumption of parenthood ought to be extended to cases where children are born into a household of same-sex partners joined in a civil union, or other state equivalent institutions. This is the emerging rule. In the District of Columbia, for example, both same-sex domestic partners and spouses (including same-sex spouses) are automatically reported as a child's legal parents.³⁴¹

Thirty-six percent of Americans live in jurisdictions where lesbian and gay couples can marry or enter a civil union—which means that almost two-thirds live in a nonrecognition jurisdiction.³⁴² For lesbian and gay couples raising children in most of those nonrecognition jurisdictions, the current default rule is that only one partner (usually the biological mother) will be the legal parent. This is a default rule that ought to be easier to override than it is now for lesbian and gay parents who are unmarried and not joined in a civil union or its equivalent. The simplest, and best, solution is the one advocated by Professor Polikoff and adopted in the District of Columbia: for unmarried and unpartnered couples who voluntarily agree to co-parent, District law now allows both parents to be listed on the birth certificate.³⁴³ This is an approach that ought to be adopted everywhere. Even some traditionalists might be willing to support,

340. Compare Polikoff, *supra* note 339 (articulating early family equality for lesbian couples), with POLIKOFF, *supra* note 14 (articulating a more recent vision of such equality and in more depth).

341. D.C. CODE § 7-205(e)(2)–(2A) (2001).

342. The United States has 308.8 million people. Jurisdictions recognizing (or soon to recognize) gay marriage, civil unions, or equivalent domestic partnerships include California (37.3 million), New York (19.4 million), Illinois (12.9 million), New Jersey (8.8 million), Washington (6.8 million), Massachusetts (6.6 million), Maryland (5.8 million), Connecticut (3.6 million), Iowa (3.1 million), Nevada (2.7 million), Hawaii (1.4 million), New Hampshire (1.3 million), Rhode Island (1.1 million), Vermont (0.6 million), and the District of Columbia (0.6 million). See KRISTIN D. BURNETT, U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS: CONGRESSIONAL APPOINTMENT 1–2 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf>; see also 2010 Census Interactive Population Search: DC—District of Columbia, U.S. CENSUS BUREAU, <http://2010.census.gov/2010census/popmap/ipmtext.php> (last visited Mar. 24, 2012). Note that I am including Maryland and Washington, whose marriage-recognition statutes will probably be subject to popular referenda later in 2012 and might not go into effect if they are negated.

343. D.C. CODE § 7-205(e)(3); see Polikoff, *supra* note 338, at 238–40 (justifying such laws, based upon the best interests of children).

or not oppose, this needed reform, because allowing children to have two legal parents from birth is usually better for children than having just one legal parent, even under a philosophy that considers lesbian and gay unions inferior to straight marriages as situses for rearing children.

Often straight, lesbian, and gay partnerships form after children have been born. Straight unmarried couples have the option of adoption: if the other legal parent does not stand in the way (because of death, waiver, or absence), the nonparent partner can usually adopt the child. Many states have allowed lesbian and gay couples to enter "second-parent adoptions," whereby the same-sex nonparent partner can adopt the child.³⁴⁴ Some states that do not allow same-sex marriages, civil unions, or second-parent adoptions recognize the rights of "de facto parents," namely, caregiving partners who are important to the child's early development and wish to remain in the child's life after the legal parent and the de facto parent have broken up as a romantic couple.

To recognize de facto parenting rights but not second-parent adoption (or step-parent adoption in those states recognizing same-sex marriages or civil unions) is an inferior legal regime—and frankly one that flaunts the best-interests-of-the-child standard that governs these issues. A particularly questionable approach is the one taken recently by the North Carolina Supreme Court in *Boseman v. Jarrell*.³⁴⁵ Some lower courts in North Carolina had been recognizing second-parent adoptions for female partners of children's biological mothers. The state supreme court not only disapproved of the practice as a matter of the state adoption law but also went out of its way to rule that the lower courts had no jurisdiction to enter such orders.³⁴⁶ As a result, a number of adoption orders were technically voided by a highly dynamic reading of the jurisdictional provision, a point that dissenting justices cogently pursued.³⁴⁷ Although the majority opinion held out the possibility that the same-sex partner could be recognized as a de facto parent because the biological mother had agreed to share responsibilities with her,³⁴⁸ the ruling potentially disrupted the lives of an undetermined number of children without legal or moral justification.

The larger problem with *Boseman* is the court's refusal to allow lesbian parents to create clear lines of legal authority to support their children. Second-parent adoption permits the parents to establish such authority *before* problems arise, whether because of the death or disability of the biological mother or because of the breakup of the couple. De facto parenthood, in contrast, vests parental authority only *after* a problem arises—usually the breakup of the romantic couple. An ex post remedy such as de facto parenting is greatly inferior to an ex ante remedy such as second-parent adoption because it is

344. See Polikoff, *supra* note 339, at 522. For a survey of state practices as of January 2011, see ESKRIDGE & HUNTER, *supra* note 8, at app. 7.

345. 704 S.E.2d 494 (N.C. 2010).

346. *Id.* at 500–01.

347. *Id.* at 505 (Timmons-Goodson, J., dissenting); *id.* at 509–10 (Hudson, J., dissenting).

348. *Id.* at 504 (majority opinion).

expensive to pursue and does not provide clear guidance (de facto parenthood requires an inquiry into the child's domestic situation and is often hard to predict beforehand).

C. FUTURE DIRECTIONS FOR OUR PLURALIST FAMILY LAW

In light of family law's heterogeneous goals and the different utilitarian visions that fuel continuing debates over marriage equality and other issues, directions for the future are hard to predict with great certainty. Consider some recommendations that flow from the analysis found in this Article and in the emerging corpus of scholarship regarding what I am calling the new pluralist family law.

1. Family Law Pluralism: The Reach of the Nondiscrimination Norm

The central question for a pluralist family law is what relationships the law ought to recognize and what regulatory regime ought to be offered to each relationship. The biggest difference between the old natural law understanding of family law and the newer utilitarian one is that the latter supports a baseline of nondiscrimination that is alien to the former. Such a baseline does not militate against legal distinctions but does demand that exclusions be supported by something more than moral disapproval.

As both a normative aspiration and a predictive matter, family law's longtime discrimination against LGBT relationships will continue to erode and will ultimately be ended, as a matter of open, formal discrimination.³⁴⁹ American family law has abandoned the natural law understanding that enshrined discrimination against lesbian and gay families, as well as against interracial families, and has adopted an openly utilitarian understanding that is a favorable context for marriage-equality claims. Now that happiness and human flourishing have become the linchpins for family recognition, LGBT families will have to be given fair and equal recognition, for pluralism-based reasons. As a matter of utilitarian pluralism, it appears to be the case that same-sex marriage and civil unions are sites for human flourishing, fulfilling (as well as disappointing) the aspirations of lesbians, gay men, bisexuals, and transgendered Americans. As a matter of political pluralism, LGBT persons are swiftly becoming an integral group in American politics—and a group that must be treated with dignity and respect. Just as it is unthinkable today for a public figure to support the old exclusion of different-race couples from civil marriage, so thirty years from now it will be unthinkable for a public figure to support the old exclusion of same-sex couples.

A pluralist family law that incorporates romantic LGBT couples must also

349. Lesbian and gay families are prominent agenda setters at several cutting edges of a reconfigured family law that accommodates this new pluralism, but they are not alone. Families where at least one of the partners is transgender are at another, related cutting edge—and the normative issues are just as easy: our pluralist family law needs to afford full recognition to these families of choice, respecting adult partnerships and protecting parental rights of transgender persons.

fully and equally incorporate LGBT parents. Thus, the agenda relentlessly pursued by Professor Polikoff is, contrary to her own pronouncements, closely connected with the agenda of marriage equality.³⁵⁰ The United States is in the process of recognizing that LGBT persons are just as functional, just as dignified, and just as flawed as straight persons and that their flourishing often entails romantic relationships and the rearing of children. Once this simple fact is internalized within our political culture, marriage equality will result, as will Professor Polikoff's norm, where the state facilitates rather than frustrates the efforts of LGBT parents to establish secure legal relationships with the children they are raising.³⁵¹

Marriage equality for LGBT persons is hard to deny under utilitarian premises. There are, however, more difficult issues on the horizon. For example, our pluralist family law must confront normative issues raised by romantic partners who are related to one another or who consist of more than two participants.³⁵² These newly salient partnerships need to be evaluated from the utilitarian perspective that now dominates our family law and not from a moralistic or religious perspective characteristic of the natural law understanding that has been displaced. For example, American family law must confront incest-based bars to marriage and other institutions. Can the traditional bar to first-cousin marriages be maintained? Marriages between persons who are related by affinity (such as step-siblings) rather than by blood? Should Woody Allen have been able to marry his step-daughter?

So how should the law relate to unions between "related" persons? The analysis of this Article raises three questions that policymakers need to confront.³⁵³ To begin with, what should be the role of mandatory criminal rules? The most powerful justification for mandatory criminal rules is present in those instances where an older relative (especially a parent) engages in sexual conduct with a minor,³⁵⁴ but most states are dealing with that urgent problem through

350. Cf. POLIKOFF, *supra* note 14 (objecting to the LGBT rights movement's focus on marriage equality and arguing in favor of a greater focus on family equality).

351. That agenda is laid out in Polikoff, *supra* note 338, at 212–14.

352. For thoughtful reconsiderations, see generally, Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543 (2005) (discussing how the incest taboo has been used to trigger disgust toward same-sex relations and suggesting that incest laws, to the extent that they should continue to exist, be justified by reasoned argument rather than disgust); David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997) (comparing the governmental response to polygamy to the response to same-sex marriage); and Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997) (arguing that the prohibition of polygamy is justified, but that same-sex marriage should be permitted because, like traditional monogamous marriage, it contributes to the development of the modern liberal state).

353. In applying my analysis, I draw from the exhaustive and brilliantly analyzed work in Leslie Pope, *The Disputed Boundaries of Incest: Trying To Justify the Scope of U.S. Incest Law After Lawrence* (Supervised Analytic Writing, Yale Law School 2009) (unpublished paper) (on file with author).

354. See Graham Hughes, *The Crime of Incest*, 55 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 322, 330 (1964) (proposing that the criminal incest statutes ought to punish men that have sexual intercourse with a biological daughter or granddaughter, stepdaughter, or adopted daughter who is less than

more targeted child-abuse or aggravated-incest statutes, rather than general incest prohibitions that are obviously overbroad in relation to this problem.³⁵⁵ The justification for these targeted statutes is that the adult offender has taken “unconscionable advantage of his or her relationship to the victim, arising out of kinship or duty of protection or supervision.”³⁵⁶ This justification does not necessarily apply in cases where the romantic couple consists of adult relatives, especially if they are related distantly (as cousins) or by affinity only.

Where related adults are involved in a romantic relationship, some states impose no criminal penalties but do prohibit the related partners from getting married.³⁵⁷ Though the personal stakes are lower, this kind of rule also requires a serious utilitarian defense. Some categories of incest bars are harder to defend than others, within the confines of the utilitarian understanding of family law. For example, bars to marriages between first cousins cannot persuasively be defended on eugenics-based grounds (specifically, fear of birth defects),³⁵⁸ and in most instances cannot plausibly be defended on family-harmony grounds (that is, protecting the family as a harmonious sexual safe space).³⁵⁹ Some step-relatives and relatives by affinity fall in love and would derive great happiness and fulfillment from marrying—and the eugenics and family-

twenty-one years old); Note, *Inbred Obscurity: Improving Incest Laws in the Shadow of the “Sexual Family,”* 119 HARV. L. REV. 2464, 2465 (2006).

355. See, e.g., 720 ILL. COMP. STAT. 5/12-16 (2010) (declaring that a person is guilty of “aggravated criminal sexual abuse” if he or she “commits an act of sexual conduct with a victim who was under 18 years of age when the act was committed and the accused was a family member”); KAN. STAT. ANN. § 21-3603 (2007) (declaring that a person is guilty of “aggravated incest” if he marries a person who is under eighteen years of age and is the offender’s “biological, step or adoptive” “[c]hild, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece” or has sexual intercourse with a person between sixteen and eighteen years old and is the offender’s “biological, step or adoptive” child, grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew, or niece); LA. REV. STAT. ANN. § 14:78.1 (2004) (similar); MICH. COMP. LAWS ANN. §§ 750.520b–.520c (West 2004) (declaring that a person is guilty of “criminal sexual conduct” if he engages in sexual intercourse with a person who is under thirteen years old or a person between the ages of thirteen and sixteen to whom he is related “by blood or affinity to the fourth degree”); S.D. CODIFIED LAWS §§ 22-22A-3, 25-1-6 (2009) (a person is guilty of “aggravated incest” if he engages in an act of sexual penetration with a person who is under eighteen years old and the offender is the person’s natural parent, adopted parent, current stepparent, former stepparent, grandchild, sibling, uncle, aunt, niece, nephew, “whole blood” cousin, or “half-blood” cousin). Some of these statutes sweep broadly enough to capture cohabiting boyfriends, e.g., MICH. COMP. LAWS §§ 750.520b–.520c (West 2004), and foster parents, e.g., S.D. CODIFIED LAWS § 22-22A-3.1 (2009).

356. David Royce & Anthony A. Waits, *The Crime of Incest*, 5 N. KY. L. REV. 191, 195 (1978).

357. Almost every state has a civil statute excluding specific blood or affinitive relationships from civil marriage and a separate statute criminalizing marriage or sexual intercourse between persons who are related by blood or affinity. See Pope, *supra* note 353, at 4 & app. tbl.1. According to Pope, for thirty states these prohibitions are not coextensive. See *id.*

358. See Robin Bennett et al., *Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors*, 11 J. GENETIC COUNSELING 97, 115–16 (2002).

359. See generally MARTIN OTTENHEIMER, *FORBIDDEN RELATIVES: THE AMERICAN MYTH OF COUSIN MARRIAGE* (1996) (expressing great skepticism toward state bars to first-cousin marriages and demonstrating that such bars are highly unusual in industrialized polities outside the United States).

harmony rationales would be just as weak in many of those cases.³⁶⁰ The eugenics-based rationale is surprisingly weak for barring marriages between parents and children or between blood siblings,³⁶¹ but the family-harmony rationale provides a stronger justification even when both parties to the marriage are adults.³⁶²

Some adult couples barred from marriage on grounds of incest have potential constitutional claims in light of the Supreme Court's privacy and equal protection jurisprudence, which can be read to insist upon utilitarian justifications for discriminations against sexual minorities (perhaps not just gay men, lesbians, and bisexuals).³⁶³ As this Article illustrates, however, the primary focus for regulatory reform ought to be state legislatures, not the U.S. Supreme Court. State legislatures have been constantly revising marriage and incest laws in the last generation and (so far) largely without the hysteria and political exploitation that has accompanied the same-sex marriage debate. Some of the reforms are in the directions outlined above: greater focus on child abuse and exploitation and less focus on adult relations,³⁶⁴ less regulation of distant relationships such as first cousins³⁶⁵ and relatives by affinity,³⁶⁶ and creation of new institutions such as reciprocal-beneficiary institutions that are open to close relatives and afford unitive rules to those couples.³⁶⁷ The utilitarian understanding of family law provides a robust justification for all of these trends, and scholars ought to pursue other ramifications through studies that draw more deeply from biology, sociology, and economics.

The same questions might be asked of adult polyamorous relationships:

360. See *Israel v. Allen*, 577 P.2d 762, 764 (Colo. 1978) (invalidating a state marriage bar to adult siblings by adoption, and rejecting family harmony and other state justifications).

361. See Pope, *supra* note 353, at 15–17 (documenting this trend).

362. On the family-harmony rationale, compare *Commonwealth v. Rahim*, 805 N.E.2d 13, 18 (Mass. 2004) (declining to apply state incest law to relationships of affinity, particularly when between consenting adults), with *Benton v. State*, 461 S.E.2d 202, 203–04 (Ga. 1995) (upholding state incest law as applied to relations between adults related by affinity, based upon the family-harmony rationale).

363. For scholars making these arguments, see Clare Kasemset, *Should Consensual Incest Between Consanguine Adults Be Restricted?*, 2 INTERSECT 83 (2009); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 60–62; Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right To Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL'Y 262, 265–72 (2000).

364. See Pope, *supra* note 353, at 10–14 (documenting this trend).

365. According to Pope, *supra* note 353, at 4 & app. tbl.1, in 2009, twenty-one jurisdictions permitted first-cousin marriages, twenty-two prohibited first-cousin marriages, and eight permitted first cousins to marry provided they qualify for an exemption.

366. See Pope, *supra* note 353, at 21–25 (documenting this trend).

367. See, e.g., RALPH C. BRASHER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 82 (2004) (discussing how reciprocal-beneficiary laws can “actually promote and strengthen traditional family structures,” give proponents of heterosexual marriage “no cause to object” by limiting such laws to those legally unable to marry, and include “close blood relatives such as . . . elderly siblings or . . . parent and child”); STEPHEN J. HYLAND, *NEW JERSEY DOMESTIC PARTNERS: A LEGAL GUIDE* 3 (2004–2005) (noting that Hawaii's Reciprocal Beneficiaries Bill would provide “a limited set of rights to anyone who was legally unable to marry, including close relatives”).

Should they be criminalized? Probably not, unless there is evidence of coercion or abuse, especially involving minors. Should romantic triples as well as couples be allowed to marry? This is a hard question under the utilitarian perspective. If not marriage, should another institution be created? Indeed, a separate regime might be necessary, as the marriage, civil union, and reciprocal-beneficiary defaults assume a two-person union. For a romantic triple, who would be the default guardian, executor/trix, heir, or decision maker should one of the partners die or become incapacitated? One idea suggested here is that the state might follow the example of Colorado's 2009 designated-beneficiary law and include in the statute or append to the statute, with flexibility for administrators to update, a form of questions and opt-in/opt-out choices for each member of the union.³⁶⁸

Consider also that American family law already "recognizes" families with more than two adults. In particular, children in our country sometimes have more than two legal parents. A child might have a biological father who lives in a separate household but has retained his parental rights and responsibilities, a biological mother who works outside the home, and a caregiving mother who might be either a second parent by adoption or a de facto parent.³⁶⁹ Admittedly, this kind of legal (recognized by a court) or quasi-legal (contained in a contract that may or may not be enforceable) "polyparenting" is unusual in today's family law but will probably become a more common phenomenon in the future. If a child can have three parents, each with legal rights and responsibilities to the child, it is not a great utilitarian policy leap for the law to recognize legal rights and responsibilities among the three adults as partners. Whether polyamorous relationships become a major policy issue for family law pluralism depends on whether such families will, in the future, proliferate the way lesbian and gay families have done.³⁷⁰

2. Freedom of Contract: Mandatory Rules Ought To Be Cautiously/Narrowly Deployed in Our Pluralist Family Law

Mandatory rules in family law have long been inspired by natural law morality. With the substantial replacement of the natural law baseline with the utilitarian one, most mandatory rules have been retired or have been replaced with default-and-override rules or with positive incentives. This has been a good development, even from a utilitarian perspective that seeks to encourage

368. See *supra* notes 257–58 and accompanying text.

369. See David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, in WILSON, *RECONCEIVING THE FAMILY*, *supra* note 218, at 47, 48–55 (describing and criticizing a tentative movement in the case law, strongly endorsed by the ALI's *Principles*, toward recognizing more than two adults as legal "parents" in some jurisdictions).

370. See Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337 (2004) (arguing that the law's recognition of new kinds of families depends on the power of the accompanying social movement; the LGBT rights movement will secure marriage equality, but it is not clear that related persons or polygamists will generate enough of a social movement to be as broadly successful).

committed relationships. To begin with, the utilitarian understanding of family law is skeptical of mandatory rules dictating or forbidding capable adults to make romantic and relationship choices that meet their needs. If the goal of family law is to facilitate individual happiness *and* if individuals and couples are heterogeneous in their tastes, mandatory rules are usually inappropriate because they close off choices that will be good for some couples and some children raised by those couples.³⁷¹ Because the state is not omniscient, state-dictated choices will always be inappropriate for many romantic couples—and because the state is often slow-moving, state-dictated choice will sometimes be inappropriate for most couples. Tastes are dynamic; hence, state-dictated choices today will be out of sync with the needs of even more romantic couples ten years from now. It is for these reasons that state-dictated mandatory rules have typically been clumsy forms of regulation and have often been disastrously ill-suited for the needs of romantic couples.

Mandatory rules, especially when expressed in the criminal law, often create harmful modes of state regulation. When they become disconnected from social needs or assumptions, mandatory rules might then become useless or even counterproductive in advancing the instrumental goals attributed to them. If states, for example, had retained their high barriers to divorce, would mandatory or strong default rules have guaranteed long-term committed marriages? I doubt it. There is no hard evidence that mandatory rules at odds with emerging social mores had any effect on Americans' sexual and family behaviors in the twentieth century—and they often had malign effects, such as creating or prolonging unhappy marriages, corrupting police forces, and creating opportunities for blackmail and extortion.

David Boaz and the Cato Institute have pressed the case against mandatory rules even more strongly, arguing for completely “privatizing” marriage and leaving romantic relationships entirely to agreements between the romantic partners.³⁷² Relegating relationships to contract law is not a completely deregulatory move, as the post-*Marvin* cohabitation cases illustrate. Even under a contract model, there is ample room for governmental regulation to give effect to reliance interests, to protect vulnerable third parties such as children, and to encourage socially productive conduct through Kahanian nudges rather than natural law shoves. And few Americans have the foresight or the resources to

371. See Brinig & Nock, *supra* note 7 (criticizing excessively broad family law rules that do not meet the needs of particular categories of families and of children); Martha M. Ertman, *Private Ordering Under the ALI Principles: As Natural as Status*, in WILSON, *RECONCEIVING THE FAMILY*, *supra* note 218, at 284, 291–300 (defending private ordering as the appropriate baseline for most of our now-pluralist family law); Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, in WILSON, *RECONCEIVING THE FAMILY*, *supra* note 218, at 331 (defending a contract-based, private ordering approach against a rules-based approach to cohabiting relationships).

372. See Boaz, *supra* note 15; see also Ruth Mitchell, *Same-Sex Marriage—And Marriage 2* (Position Paper, Ctr. for Inquiry, Office of Pub. Policy, Nov. 2007), available at http://www.centerforinquiry.net/uploads/attachments/same-sex-marriage_1.pdf (arguing that states should recognize all relationships as civil unions, and private institutions, such as churches, may label them as marriages).

contract for all the possibilities that can arise in family relationships—which means that state menus and default rules will inevitably affect people’s decisions about interpersonal commitment and family. As Naomi Cahn and June Carbone have argued, any regime requiring romantic partners to engage in contracting and strategic planning will have class-based effects, imposing special burdens on poor and working-class couples.³⁷³

Assume, however, that Americans have the capability to enter into freely consented, extensive contracts that cover all the contingencies (as implausible an assumption as that is). Three big issues are immediately suggested by any proposal that the state ought to do nothing more than enforce agreements entered into by romantic partners. Perhaps the most interesting puzzles are in answer to this question: What items can be the basis for private contracting? Obviously, the state has to decide what rules ought to be mandatory. This is an unexpectedly complex inquiry:

- Should romantic partners be able to contract around third-party rights, such as their respective duties to support and maintain the children they are raising? Presumably, the state ought to maintain basic rights for vulnerable children, but may the partners bargain so that, for example, one spouse assumes a greater burden of future support obligations in return for relief in the present?
- Should romantic partners be able to renegotiate override rules? For example, if the romantic couple wants to negotiate for a covenant marriage in a state that offers no-fault divorce, should their agreement bind them, so that a judge in the marital state will not grant a divorce except upon the more stringent terms?³⁷⁴
- Can romantic partners consent to particular moral sanctions, or lack thereof? For example, can the spouses enter into agreements to penalize either spouse for drug use or other malfeasance, through an adjusted property or support settlement upon divorce?³⁷⁵ Can a spouse agree at the beginning of a marriage not to complain if she or he is forced against her or his will into marital sexual activities? Does the written agreement constitute the kind of “consent” that negates a rape or sexual assault charge?

373. See CAHN & CARBONE, *supra* note 7 (noting that family law rules play out very differently based on class; marriage, for example, is flourishing among well-to-do couples, leaving poor or working-class couples with fewer legal supports for their relationships).

374. Compare *Massar v. Massar*, 652 A.2d 219 (N.J. Super. Ct. App. Div. 1995) (enforcing a spousal contract restricting the grounds upon which either spouse could seek a divorce), and Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998) (supporting a spousal right to agree upon a stricter divorce regime than that permissible under state law), with AM. LAW INST., *supra* note 218, § 7.08(1), Reporter’s Notes, cmt. a (following the weight of state court precedent to provide that such contracts would not be enforceable).

375. See *In re Marriage of Merhen and Dargan v. Dargan*, 13 Cal. Rptr. 3d 522 (Cal. Ct. App. 2004) (holding that spouses could not contract for penalties to either spouse who engaged in “immoral” conduct, for such agreements were contrary to the policy of California’s no-fault divorce law); AM. LAW INST., *supra* note 218, § 7.08(2) (similar).

Thus, for reasons of fundamental (utilitarian) social policy, the state will want to preserve third-party rights, override protocols, and fundamental liberties through mandatory rules—or perhaps through super-stringent override rules. For example, if the romantic partners want to consent, in advance, to a covenant marriage in a jurisdiction that does not have a covenant-marriage law, my view is that legislatures or courts ought to allow them to do so, subject to a stringent set of override rules: (1) explicit, clearly stated consent is in writing before the partners marry; (2) a competent attorney or judge swears that the partners are aware of the ramifications of this decision; and (3) either partner can revoke her or his consent within six months of the marriage.

This thought experiment suggests the continued role of mandatory rules for family law's pursuit of its utilitarian goals, especially protection of vulnerable persons or third-party interests. But the primary regulatory mechanism for our family law pluralism ought to be override rules, not mandatory rules. Mandatory rules have been replaced by default-with-override rules across the board in family law—from entry into various institutions to the rules governing the partners' exit from the institution. Override rules may be a superior form of regulation even in some areas where the state has legitimate concerns about the parties' decision making. For example, it makes sense for the state to have a mandatory rule barring fourteen-year-olds from marrying, because such persons are deemed cognitively unequipped to make this major life decision, but how about seventeen-year-olds? In that case, the state's judgment might be more nuanced: if mature third parties, such as parents or a guardian, agree to the marriage, the seventeen-year-old may wed. Consider another example, closer to the edge of family law: soften the mandatory rule, followed in many states, barring adult siblings by marriage from wedding, and adopt an override rule allowing such marriage if the parents consent.

Issues that are sure to occupy family law in the future will probably be handled more productively through default-and-override rules than no rules at all or than mandatory ones. For example, should the progeny of a sperm or egg donor have access to the identity of her biological parent (or vice versa)? At present, there is virtually no state regulation, and so the matter is left to private contracts, which usually assure secrecy.³⁷⁶ As Naomi Cahn has argued, private contracting has left children without access to important information (relevant to health concerns, for example) and family ties. She suggests that the law should assure children access to their donor information once they reach eighteen years old.³⁷⁷ Hence, she would change the default from "no access" to "access," at the behest of the progeny. As she concedes, the new default raises

376. Cahn, *supra* note 37, at 390–94 (demonstrating that there is virtually no state regulation of the relation of sperm or egg donors to offspring, and so the matter is left to private contracting).

377. *See id.* at 413–16.

privacy and other concerns—concerns that I suggest might be met by retaining the old default (no access) but creating an override process where the donor's views can be considered by a decision maker if the donor objects.

The broader point here is that override rules are all about process—and process is a mechanism for ameliorating colliding substantive concerns. (This is yet another reason why mandatory rules are out of favor: they tend to be all-or-nothing substantive decisions that do a poor job of accommodating genuinely troubling substantive clashes.) In the new world of family law pluralism, good procedures are not only the mechanism by which couples can make intelligent, utility-maximizing choices, but can also be a mechanism for working through situations when different persons have conflicting interests.

3. Democratic Deliberation: The Menu of Relationship Regimes Should Be Clarified and Codified

Under the utilitarian understanding of family law, a menu of different legal regimes for romantic relationships ought to be better than the marriage-monopoly regime. Marriage is not a good idea for everyone, and two of the consensus goals of family law—efficient decision making and protection of vulnerable persons—are goals that are not limited to couples who are committed to lifetime partnerships. Essential to the utilitarian understanding is the democratic notion that the happiness of every person is relevant to the law, and this feature demands the pluralist family law that our culture has accepted. Even a traditionalist approach to family law cannot ignore this reality.

The menu of legal regimes for romantic couples that various states now offer, however, is unsatisfactory, because it is so unsystematic. Regimes have been created willy-nilly, as ad hoc compromises like civil unions and domestic partnerships or as piecemeal Christmas trees like the cohabitation regime. The ad hoc approach is bad from any perspective, because there has usually been no systematic examination of the effects of new regimes on the proper goals of a pluralist family law. For the best example, cohabitation regimes have emerged as a result of uncoordinated judicial, legislative, and executive decisions, without any public deliberation about the following key issues:

- *Coherence*: Does our patchwork of default and override rules constitute a regulatory regime? In some states, the answer is yes. In most states, the patchwork is so unsystematic that the answer remains unclear.
- *Notice*: Is this regime one that cohabiting couples are aware of? Rarely do couples know much about the regime; lack of notice to the citizenry is intolerable for a pluralistic family law.
- *Rationality*: Is the regime optimal under the balance of utilitarian goals the polity has agreed upon? Because the cohabitation regime is a hodgepodge of state judicial decisions, state domestic-abuse and other independent

statutes, federal safety-net laws, and administrative practices, there is not a single jurisdiction where the cohabitation regime has been publicly deliberated. Are the cohabitation rules fair to both of the romantic partners and children they might be raising? Are the rules too much like marriage rules from a progressive point of view? Do they create a competitive alternative that undermines marriage from a traditionalist point of view?

These are questions that need to be considered—and deliberated in a public process that also considers how many items the state menu ought to offer romantic partners and how the different regulatory regimes relate to one another.

Importantly, this deliberative process ought to occur in state legislatures, preferably assisted by the kind of regulatory-reform commissions that spearheaded criminal law as well as divorce law reform in the 1960s and 1970s. Different state legislatures will come up with a different mix of regimes on their menus—and that can be a good thing, for the various states can experiment with different regimes, and we can all learn from this family law pluralism. Table 2 below provides an array of choices for legislators. The terminology is less important than the driving concept of the table: the greater the mutual commitment of the couple, the more rules, rights, duties, and benefits the state ensures within the regime.

Table 2. Menu of Regimes and Their Rules, January 2012

	Support/ Responsibility for Children	Employment Benefits	Unitive Rules	Support/ Property- Division Rules	Formal Divorce	Family Bonus
Domestic Partners	X	X				
Reciprocal Beneficiaries	X	(X)	X			
Cohabiting Partners	X	(X)	X	X		
Persons Joined in Civil Unions	X	X	X	X	X	
Married Persons	X	X	X	X	X	
Covenant Married Persons	X	X	X	X	X	X

The vocabulary and concepts in this Article help clarify for lawmakers precisely what public law decisions need to be made and what policy considerations are relevant. *First*, the political culture needs to think about the mix of family law goals it wants to pursue. Most jurisdictions probably favor some mix of the three traditional goals, namely, encouragement of committed relationships, protection of vulnerable persons such as children, and facilitation of efficient decision making. The questions for policymakers are these: Which goal, if any, deserves priority? How aggressive should the state be in pursuing any of these goals? Which mix of regimes on the menu would best serve the state's goals for family law?

The key regulatory question is whether the state wants to encourage committed relationships by favoring marriage (or covenant marriage). Indeed, as to this issue, traditionalists who valorize committed relationships have been doing useful and persuasive work, for they are producing evidence to support the proposition that both individual and societal utility are served by a citizenry who marry and have children. Building upon the many books and articles showing that marriage is correlated with (and arguably a cause of) greater happiness, wealth, and good health, recent studies are deploying more sophisticated methodologies to suggest utilitarian advantages for cultures where marriage-for-life is the norm. Thus, Margaret Brinig contrasts African Americans, who live in a country where most adults still marry, and Quebecers, who live in a country where most adults cohabit but do not marry. Professor Brinig finds that the latter population, notwithstanding material advantages and a more tolerant culture, are more suicidal and much less happy than the former population.³⁷⁸ Professor Brinig's study has the virtue of comparing two "minority" groups under experimental conditions (that is, they were embedded in cultures that took dramatically different postures toward giving state priority for marriage) and producing significant and surprising conclusions.

Although causal relationships have not been conclusively established by Professor Brinig or other researchers, the weight of the available evidence suggests not only that the state should not abandon civil marriage as an institution, but also that the state should be encouraging civil marriage and giving it regulatory priority. Progressives, who tend to be more skeptical of marriage-preferring policies, have not refuted this mounting evidence with studies supporting their point of view—and until they do they cannot expect policymakers to reject the marriage-preferring arguments made by conservative utilitarians.

378. See Margaret F. Brinig, *Two Treatments of Pluralism: Canada and the United States* (2012) (unpublished manuscript) (on file with the author).

Second, lawmakers need to consider how the different regimes interact with the different goals. If society wants to encourage committed relationships, it probably ought to offer civil marriage as a prominent option. That is only the first of many questions policymakers ought to consider, however. Should the regulatory regime be one called “marriage”? The presumptive answer to that question is “yes” because of the overlapping reinforcements of committed marriages, namely, encouragement by social and family pressures, by religious sanction and support, and by state encouragement and subsidy.

In that event, the question becomes, What regulatory structure should marriage entail? Civil marriage today entails much less commitment than civil “marriage” did in 1911. Should the state encourage more commitment? If so, how? Through state incentives? Through harder default rules, especially for divorce (or divorce when there are children)? Through stronger child and spousal support rules and better enforcement?

These are politically difficult choices for legislatures to make; indeed, even the bluest of states is loathe to take back some of the liberty conferred upon married partners by the no-fault divorce revolution. Should the state then consider “multi-tiered marriage,” namely, a menu offering marriage with no-fault divorce *and* covenant marriage that is harder to exit *and* even marriage regimes governed by religious tribunals rather than state courts?³⁷⁹ If the state opts for covenant marriage, what incentives would induce more couples to choose that higher level of commitment that the state considers optimal from a utilitarian perspective?

Progressive critics of marriage favor less state emphasis on marriage regimes in the family law menu. To the extent progressives believe that the state over-rewards commitment, they need to make a stronger utilitarian case for their position, given the mounting evidence supporting the utilitarian case for marriage. As a complementary strategy, progressives ought to be emphasizing the positive features of their platform, namely, the importance of state facilitation of a broader array of relationships through expanded safety-net benefits and through decision-making rules. Consider the list of relationships compiled by *Beyond Marriage*.³⁸⁰

- Senior citizens living together, serving as each other’s caregivers, partners, and/or constructed families
- Adult children living with and caring for their parents

379. See Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT’L L. 135 (2007).

380. *Beyond Same-Sex Marriage*, *supra* note 311 (quoting list on website).

- Grandparents and other family members raising their children's (and/or a relative's) children
- Committed, loving households in which there is more than one conjugal partner
- Blended families
- Single parent households
- Extended families (especially in particular immigrant populations) living under one roof, whose members care for one another
- Queer couples who decide to jointly create and raise a child with another queer person or couple, in two households
- Close friends and siblings who live together in long-term, committed, non-conjugal relationships, serving as each other's primary support and caregivers
- Care-giving and partnership relationships that have been developed to provide support systems to those living with HIV/AIDS

Even a conservative family law ought to be attentive to some, perhaps most, of these relationships and ought to facilitate and even encourage them. In a comprehensive consideration of a state's family law menu, these nonconjugal relationships establish a compelling case for every state to add a reciprocal- or designated-beneficiary law to its family code. The Colorado statute is of particular interest, for it allows the designated beneficiaries to opt in or opt out of a detailed list of rights and duties, so as to tailor the state's menu of rights to fit the needs of the beneficiaries.

The critical battleground between traditionalists, strongly emphasizing the (utilitarian) value of commitment and marriage, versus progressives, emphasizing other goals for family law, ought not be the gay marriage debate, but instead ought to focus on the precise role that a cohabitation regime should play in the family law menu of relationship options. Should cohabitation be recognized as a formal regime, with specific boundaries (defining "cohabitation," for example) and a well-considered array of state default-with-override rules and benefits? There is a trade-off between a cohabitation regime and marriage: many couples who would otherwise marry will cohabit instead.³⁸¹ Family law scholars,

381. For attacks on the ALI's *Principles* for their endorsement of domestic partnerships and a contract-based approach to family law as inconsistent with the state's traditional preference for marriage-for-life, see, e.g., Jane Adolphe, *The Principles and Canada's "Beyond Conjugal" Report: The Move Towards Abolition of State Marriage Laws*, in WILSON, RECONCEIVING THE FAMILY, *supra* note 218, at 351; Lynn D. Wardle, *Beyond Fault and No-Fault in the Reform of Marital Dissolution Law*, in WILSON, RECONCEIVING THE FAMILY, *supra* note 218, at 9.

however, have provided us with little illumination as to whether most, or any, cohabiters would be happier or better off if they had married. And no illumination whatsoever as to whether a relationship population sorted between spouses and cohabiters would enjoy an overall higher level of happiness.³⁸² So this issue remains a mystery under the utilitarian framework.

A related topic of deep interest and no answers is this one: What default and override rules should the state impose upon cohabitation? If, as appears likely, the political culture allows cohabitation without marriage but favors committed relationships, it might impose more commitment-confirming default rules upon cohabitation, such as a rule that after "x" years of cohabitation a couple is presumed to share property and income and that a breakup imposes income and property-sharing obligations on the partners.³⁸³ By imposing alimony and property-division rules upon cohabiting couples, the state makes cohabitation more like marriage and thereby encourages committed relationships on two fronts: among cohabiting couples, who have presumptive obligations, and among married couples, who would have the same sorts of obligations as cohabitants (so why not get married?). Yet this approach is beset with criticisms from all sides. On the one hand, making cohabitation more like marriage is probably inconsistent with the expectations of cohabiting couples; rather than an ordinary default rule, this is more like a "penalty default," where the law sets an unreasonable default in order to press the parties to negotiate their own solution (a result highly unlikely in this setting, however).³⁸⁴ On the other hand, treating cohabitation "like" marriage weakens both regimes: couples who would benefit from marriage are drawn into cohabitation, to the detriment of them or their children, whereas couples who do not want and would not benefit from the commitments entailed in marriage find themselves saddled with unwanted, and perhaps unnecessary, obligations.³⁸⁵

382. That is, many couples would be unhappy if they were married, perhaps because they do not "want" a lasting relationship or because they fear the expense and terror of divorce more than other couples. And those not-designed-for-marriage couples "know" this about themselves with a reasonable level of accuracy and so sort themselves out from married couples. In short, there is an optimal level of marriage in the United States, surely much higher than zero percent of all romantic couples, but far less than one-hundred percent either. What that level is, and even how it could be determined, are matters beyond the agenda of current family law scholarship.

383. This is the posture of the ALI's *Principles*, Chapter 6 of which would impose property-division and support defaults upon cohabiting couples (which the ALI deems to be "domestic partners") that are drawn from the rules for married couples.

384. See Margaret F. Brinig, *Domestic Partnership and Default Rules*, in WILSON, *RECONCEIVING THE FAMILY*, *supra* note 218, at 269 (making this criticism of the ALI's *Principles* and drawing from Ayres and Gertner's theory of penalty defaults).

385. Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, in WILSON, *RECONCEIVING THE FAMILY*, *supra* note 218, at 305 (assailing the ALI's domestic-partnership/cohabitation property-division and support rules on a variety of grounds, but particularly because they conflate cohabitation and marriage, which serve radically different social purposes).

In my view, cohabitation regimes ought not mimic marriage, contrary to the ALI's *Principles* and the views of many scholars. Probably, the better approach would be to codify the practices followed in most states, namely, protecting reasonable reliance interests and explicit contracts between cohabiting parties, providing special protections against domestic violence, and strongly enforcing child support obligations. Because these ideas have not been subject to empirical testing, they ought to remain preliminary—and subject to the traditionalist objection that they draw too many couples away from marriage.

Third, if the political culture considers protection of vulnerable persons to be an important goal of a pluralist family law, as our culture surely does, it needs to figure out what regimes best serve that goal and how the state should encourage such regimes. This consideration is widely believed to be the trump card for traditionalists' promarriage policy views. There is strong evidence that American children benefit from being reared by parents who remain together and that American marriages are significantly more robust than cohabiting relationships.³⁸⁶ This evidence lends increasingly powerful support to traditionalist views that marriage should be central to family law, that covenant marriage seems like an attractive option (especially as I have formulated it, as tied to benefits based upon the presence of children in the household), and that cohabitation and other competing institutions should not be encouraged.

Progressives such as Professor Polikoff, however, make the equally cogent point that a pluralist family law ought to focus more on children's needs than it does currently. Thousands of deserving children would benefit from legal rules such as second-parent adoption, parents recognized at birth, and other innovative legal mechanisms (all originating in the District of Columbia) that enable such children to enjoy the care of two parents with legal responsibilities toward those children. Because it (like cohabitation) is ad hoc and unpredictable, de facto parenthood is no substitute from a regime that is clearly articulated, under the law, for all concerned.

Table 3, below, summarizes the historical; descriptive; and forward-looking, prescriptive themes of this Article.

386. See Margaret F. Brinig & Steven L. Nock, *Legal Status and Effects on Children*, 5 U. ST. THOMAS L.J. 548, 550 (2008) (arguing that not only do children reared within a stable marriage do better in life, but also that children benefit from marital households even when marriages end in divorce).

Table 3. Evolving American Family Law

	Family Law, 1911	Changes in the Last Century, 1911–2011	Directions for New Millennium, 2012
Entry Rules	<p>Marriage monopoly</p> <p>Restrictive purity rules for marriage</p> <p>Marriage limited to different-sex couples</p>	<p>Cohabitation, civil union, other new regimes created</p> <p>End of racial exclusions; erosion of disability-based rules</p> <p>New regimes to accommodate same-sex couples</p>	<p>Expansion of menu: multitiered marriage and caregiving</p> <p>Accommodation for incestuous and polyamorous families?</p> <p>Marriage equality for LGBT persons</p>
Relationship Rules	<p>Mandatory rules enforcing monogamous marriage</p> <p>Mandatory rules of support and sexual availability</p> <p>State noninterference in marriage's internal affairs</p>	<p>Default rules replace mandatory rules for sex outside marriage</p> <p>Default rules for support and sexual consent</p> <p>More state regulation of internal affairs of marriage</p>	<p>Decriminalization of adultery and much adult incest</p> <p>Default support rules extended to nonmarital regimes</p> <p>More state regulation of internal affairs of cohabitation etc.</p>
Exit Rules	<p>Divorce only for fault (such as adultery)</p> <p>Mandatory rules governing support and property division</p> <p>Marriage monopoly</p>	<p>No-fault divorce: easier exit from marriage</p> <p>Antenuptial agreements enforced as to most issues</p> <p>New regimes (such as cohabitation) with easier exits</p>	<p>Choice of more stringent override rule for divorce</p> <p>Greater scrutiny of antenuptial agreements?</p> <p>More state protection for vulnerable persons in nonmarital relationships</p>

